NEXT ANNUAL MEETING WILL BE HELD AT LOS ANGELES, JULY 16-19

AMERICAN BAR ASSOCIATION JOVRNAL

VOL. XXI JUNE, 1935 NO. 6

Published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois.
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50.

How Safely Do You Drive and Walk? . . . . . .

There are any number of ways for a person to drive a car, and even to walk, if to be the center of attention is the chief desire to be attained, no matter what the price. But if a person doesn't care much about having the finger of ridicule pointed his way, and really wishes to stay alive, there's not a great deal of latitude to the capers one may cut.

Some of the "smarty" types of driving an automobile are shown in a new Highway Safety Test issued recently by The Travelers in connection with the booklet "Thou Shalt Not Kill." Some drivers have yet to learn, "he is a poor player who struts and frets his hour upon the stage and then is heard no more." There's the fellow who rudely cuts in on traffic, and the human giraffe who tries to see beyond the crest of a hill, just to mention a few.

Pedestrians often tread the way that surely leads straight to destruction. If they could see themselves as others see them, what a difference it might make. There's the person who crosses the street much in the fashion of the chicken, but before the chicken learned better. And what about the pedestrian who ought to be equipped with a periscope?

The new Test is not one of those things that bores one nigh onto death. It's simply an easy method by which a person can find out who's it.

THE TRAVELERS

Copies of the New Test are free. Ask for the number you would like to have to do a little classifying.

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It also approved S. 213 in principle, this being the Logan Bill, which prohibits Senators, Congressmen, National or State Committeemen of any political party or heads of Federal Departments, Commissions, etc., from appearing before such Departments, etc., in relation to any "proceeding, contract, claim, controversy, charge, accusation, arrest, imprisonment, or other matter or thing in which the United States is a party or is directly or indirectly interested"; instructed the Committee on Administrative Law to oppose S. 251, "to define lobbyists, to require registration of lobbyists, and provide regulation thereof;" and requested the Standing Committee on Commercial Law and Bankruptcy to oppose H. R. 5356, to provide for salaried referees and otherwise amend the Bankruptcy Act.

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with a Chairman to be appointed by the President; this committee to meet jointly with a committee to be appointed by the Commercial Law League of America, during the coming year "in a cooperative endeavor to determine what is a reputable law list."

Another action of general interest was the approval of an appropriation for a Memorial Window to St. Ives in the Cathedral Church at Treguier in Brittany. Action was also taken to help provide a means for financing Section publications and for certain changes designed to promote the efficiency of the Association's organization.

President Loftin's report told of Presidential activities since the meeting last January. He had devoted much time to securing new members; continued his addresses over the country, in which he had stressed the National Bar Program; devoted much attention to the Coordination Movement, by conference and correspondence; cooperated with the Special Committee on the Proposed Child Labor Amendment in opposing the adoption of that Amendment; urged State and Local Bar Associations to send delegates to the Junior Bar Conference at Los Angeles; continued his efforts to make the Vice-Presidents an active force in the Association—in which connection he mentioned the conference of delegates from Bar Associations to be held in the Seventh Circuit at Decatur, Ill., on May 24 and in the Third Circuit at Atlantic City on June 1; and had kept in touch with the work of various important committees.

Secretary William P. MacCracken, Jr., and Treasurer John H. Voorhees also presented reports showing the activities of their respective offices. Major Edgar B. Tolman, Editor-in-Chief of the JOURNAL, made an oral report as to its operations since the mid-winter meeting. Mr. George H. Smith, Chairman of the General Council, later in the meeting presented a report regarding a meeting of certain members of that body who were in Washington.

At Jacksonville the President was authorized to appoint a committee on plans for securing the portraits of Associate Justices of the Supreme Court of the United States, to be hung in the new Supreme Court building. Following are the members of the committee: Willam R. Ransom, Albert C. Ritchie, Roscoe Pound, Frank J. Hogan, Newton D. Baker, Samuel S. Williston, Charles S. Cushing, Charles Warren, Silas H. Strawn, Robert C. Dodge and O. R. McGuire.

Louisiana Law School Placed on Probation

THE Council of the Section of Legal Education and Admissions to the Bar at its meeting in Washington on May 9th put the Law School of Louisiana State University on probation and gave provisional approval to the Law School of Loyola University in Los Angeles and to the Law School of the University of San Francisco, neither of which latter two schools had previously been on the approved list of the American Bar Association. The following statement was issued by the Council in reference to its action regarding the Louisiana school:

"The Law School of the Louisiana State University has been placed in a probationary status by the Council, insofar as recognition and approval by the American Bar Association are concerned, by reason of a report made by the Adviser of the Council after a recent inspection of the school. From this report it appears that a law degree has been granted on the direction of the President and Board of Supervisors of the University without recommendation by the law faculty and before completion of the Law School work in due course by the individual receiving the degree. The Louisiana State University of Law was placed on the approved list of the American Bar Association in 1926 by reason of its compliance with the standards of the Association and the rules of the Council interpreting these standards, and as the granting of the degree by the University authorities was in violation of one of these rules, the above action was taken and the Acting Dean of the school has been notified accordingly. He will be given an opportunity to be heard, if he so desires, when the Council meets in Los Angeles."

The Council has notified the boards of bar examiners that it considers students of schools in the status of provisional approval or probation as being in the same category as students from approved schools.

The action taken in reference to the Louisiana Law School was the result of a report made in reference to the case of a young man who had been given a special law diploma "certifying graduation in law" without recommendation of the law faculty. He had been convicted in the District Court of Baton Rouge on a charge of criminal libel in connection with the publication of the Whangdoodle, a paper attacking the school administration as well as members of the faculty.

He was suspended by the late Thomas W. Atkinson, former president of the university, just before he had completed his final examinations in the Law School. He served only eight days of his sentence of one year before he was reprieved by the then Governor Huey Long, who continued to issue reprieves until 1932, when he was granted a pardon.

The Board of Supervisors of the university authorized the issuance of a degree to him, and it was signed by James M. Smith, university president, and Governor O. K. Allen, but not by R. L. Tullis, who was then dean of the Law School.

Committee on Professional Ethics and Grievances Sponsors Conference in Washington on Disciplinary Procedures

AT its Milwaukee meeting in 1934 the American Bar Association added to its four-point co-ordination program the Elimination of the Unethical Lawyer. In order to promote this particular item of the Association's program, the Committee on Professional Ethics and Grievances sponsored a conference in Washington on May 8 on the subject of Disciplinary Procedures.

The purpose of the Conference was to bring into the open as much as possible the various factors which are now proving obstacles to the profession's elimination of the ethically unfit from its ranks. To the Committee it seemed that no program for improving the effectiveness of disciplinary procedures could be effective until there is a definite understanding and appreciation of the factors in professional life which now prevent lawyers and judges from performing their respective functions with reference to this matter in a thorough and effective manner. To this end, the Conference was addressed by lawyers from different states in which the organizational set-up for dealing with disciplinary matters varies. The purpose of having this variety of representation was to discover whether there is a relationship between efficiency in this respect and different forms of organizational set-up.

The meeting was addressed by Judge Walter H. McElreath, Georgia, Chairman of the Grievance Committee of the Georgia Bar Association; Eli F. Seebirt, Indiana, President of the Indiana Bar Association last year; Charles P. Megan, Illinois, First vice president of the Illinois Bar Association, attorney for the Chicago Bar Association, a member of the State Board of Law Examiners and chairman of the National Conference of Bar Examiners; George R. Nutter, Massachusetts, Vice Presi-

dent of the American Bar Association for the first judicial circuit and prominent in bar association activities in Massachusetts for many years; John H. Barnes, Pennsylvania; Charles A. Beardsley, California, member of the Executive Committee of the American Bar Association and a former president of the State Bar of California.

The problems incident to this matter from the point of view of the judiciary were discussed by the Honorable Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma and Honorable Boyle G. Clark, of Missouri. The problems of dealing with special types of unethical conduct were considered by Stanley B. Houck, of Minnesota, chairman of the Ethics Committee of the Minnesota State Bar Association and also chairman of the Unauthorized Practice Committee of the American Bar Association, who discussed Aiding in the Unauthorized Practice of the Law. Francis J. Carney, of Massachusetts, chairman of the Committee on Professional Ethics and Grievances and a member of the General Council from Massachusetts, discussed the Use of Testimony Known to be Perjured and Jury Fixing. Justin Miller, Washington, D. C., Assistant to the Attorney General of the United States, Chairman of the Advisory Committee on Crime and chairman of the Section of Criminal Law of the American Bar Association, discussed the problems involved in the Elimination of the Lawyer Criminal.

Second Annual Meeting of Section of International and Comparative Law Held in Washington

THE Section of International and Comparative Law of the American Bar Association held its second annual meeting in the Garden Room of the Hotel Mayflower in Washington, D. C. on Wednesday May 8, 1935. The meeting was preceded by a luncheon attended by about 140 members of the Section.

Chairman MacChesney presided at the luncheon and introduced the following speakers: Scott M. Loftin, President of the American Bar Association, who made a few brief remarks bringing greetings from the Executive Committee; Assistant Secretary of State R. Walton Moore, who expressed the greetings and interest of the State Department in the activity of the Association; and Hon. Frederick McKenney, who spoke on behalf of the American Society of International Law, expressing the interest of that organization in the work of the Section and its desire to cooperate with the work of the Bar in that field; Hon. Silas H. Strawn, former Chairman of the American Section of the International Chamber of Commerce; and Col. Hugh Smith, Acting Judge Advocate General of the Army. Hon. John Dickinson, Assistant Secretary of Commerce, was one of the distinguished guests present.

The luncheon was followed by an open meeting devoted to the discussion of topics in the field of International and Comparative Law. Mr. Edward Schuster, Vice-Chairman for Comparative Law, introduced Hon. Stanley Reed, Solicitor-General of the United States, who outlined the history and growth of government-controlled business corporations in Europe and America. He predicted that we could expect an increase of activity of this sort both in the field of normally controlled governmental activity and in the ever-widening regulation of business. A paper by Thomas W. Palmer, Counsel for the Standard Oil Company of New Jersey, distinguishing between the various types of government ownership and control of corporations as they are now operating in Europe and Latin-American countries, was read by another, Mr. Palmer finding it impossible to be present.

His paper was discussed by Louis B. Wehle, former General Counsel of the War Finance Corporation, who drew a distinction between the administrative activity of government as distinguished from purely business or commercial activity, and suggested that much of the administrative function was now being handled by corporations due to difficulties in government accounting and rigidity of administrative practices, but that even with liberalization in these fields the government-controlled corporation must be made subject to periodical reports to the Comptroller-General's office in order to insure honesty in the administration.

At the close of the discussion which followed the chair was relinquished to James Oliver Murdock, Vice-Chairman for International Law, who introduced Mr. Laird Bell of the Chicago bar, Vice-President of the Foreign Bondholders Protective Council. Mr. Bell discussed at length the problems involved in attempts of the American bondholders' committees to collect foreign governmental and private bonds which were in default and pointed out especially the obstacles in the way of collection of foreign obligations by legal rather than diplomatic means.

The discussion which followed was led by Wm. S. Culbertson, American diplomat and former member of the United States Tariff Commission. Mr. Culbertson outlined the problems of creditor nations in extending credit service to debtor nations and the necessity for continued foreign debt service in spite of the present unpopularity of foreign loans in the United States.

Mr. Jesse Knight, of the New York Bar, in a short concluding discussion laid special emphasis on the difficulty in educating the American bondholder to an understanding of the problems of foreign exchange and foreign credit; and gave many graphic illustrations of embarassing situations that have arisen in recent attempts to liquidate foreign obligations which were in default.

After a lively discussion, Chairman MacChesney announced the appointment of a Committee on Military and Naval Law headed by Colonel Hugh Smith, the other members of the committee to be announced later and to include members of both the War and Navy Department. The meeting ended with a report from the Section's Committee on Double Taxation, presented by Mitchell B. Carroll as Chairman.

The various members of the Section expressed optimism over the increase in attendance and the possibility of eventually working out a permanent cooperating meeting in Washington, in connection with the American Law Institute, of members not only of the Bar Association Section but also of all other organizations interested in disseminating knowledge of International and Comparative Law problems.

Committee on the Unauthorized Practice of Law Meets at Washington

THE American Bar Association's Committee on the Unauthorized Practice of the Law met at Washington, D. C., May 6th and 7th, 1935. All the members were present.

The Committee conferred with representatives of the Richmond, Va., Bar, Messrs. Christian and Catteral, especially with respect to the practices of corporation organizers, the appeal of the Richmond Credit Association case, and various other matters; also with representatives of the Baltimore, Md., bar, Messrs. Smith and Blades, with reference to the appeal from the unfavorable decision of their City Court regarding the right of laymen and corporations to practice in justice court, and various other matters in which they were interested.

Miss Helen Prentiss, Chairman of the Unauthorized Practice of the Law Committee of the Womens' Bar Association of the District of Columbia, also attended one of the Committee's sessions. Representatives of the American Institute of Accountants, Messrs. Carey, Franke, and Arthur, called upon the Committee and discussed and considered with it the question of how best to cooperate for the purpose of solving

the problems arising from the practice of accountants.

The Committee met jointly, for the discussion of problems in which both were interested, with the Committee on Professional Ethics and Grievances. Among the subjects discussed were the practices of patent attorneys, both lay and licensed, and the general subject of law lists. At the recommendation of the Committee, the Executive Committee directed the President of the Association to appoint a special committee to consider the whole law list subject. The Committee requested the Committee on Professional Ethics and Grievances to give its opinion regarding the application of canon 35,—and other relevant canons,—to an attorney who is employed by the assignee of accounts for collection.

It was decided to hold an open meeting at Los Angeles for the discussion of: (a) Legal service rendered by laymen and lay agencies exclusively to lawyers; (b) Practice before quasi-judicial boards, commissions, bureaus, officers, and the like; (c) Practices of notaries public, real estate agents, real estate brokers and the like; and (d) Participation by lawyers in unlawful practice of the law and their discipline therefor. This meeting will be held Tuesday morning July 16, and all persons interested are invited to attend.

The question of open meetings during the ensuing year, to be held in connection with the usual meetings of the Committee, was left in abeyance pending the ascertainment of whether the funds necessary for the added expense can be secured.

The Committee decided immediately to institute an investigation into the practice of law before justices of the peace, seeking particularly to ascertain what are the conditions generally with respect to such practice, and to obtain a list of all cases, in any court, which have passed upon the question. One of the members of the Committee was directed to investigate and report upon the unauthorized practice of law by lay patent office practitioners, and by security owners protective committees or associations.

Michigan Joins Integration Column

AFTER suffering a defeat early this year by a narrow margin in its attempt to get a bill for bar integration through the legislature, the Michigan State Bar Association reformed its ranks and supported a substitute bill following the Kentucky Act giving the Supreme Court the power to organize the bar. This has just been passed by both houses of the legislature has been signed by the Governor.

The bill provides for an association to be known as the State Bar of Michigan, to which all persons now or hereafter authorized to practice law shall be members. Rules and regulations covering the conduct and activities of the Association and its members, dues (not to exceed five dollars per annum), ethical standards and discipline, are to be provided by the Supreme Court.

Michigan is the seventeenth state to join the list of those having integrated bars. The others in order of their adoption are: North Dakota, Alabama, Idaho, New Mexico, California, Oklahoma, Nevada, Mississippi, South Dakota, Utah, Arizona, North Carolina, Washington, Kentucky, Louisiana and Oregon.

A Lawyer Canonized—Lord Chancellor More's Remarkable Career

OF particular interest to the legal profession was the canonization of Sir Thomas More, lawyer, wit, scholar and former Lord Chancellor of England at Vatican City on May 19. The traditional highly impressive ceremonies were carried out. Sir Thomas More had been beatified by Leo XIII in 1886.

After a long career, during a large part of which he enjoyed the singular favor of Henry VIII, Thomas More incurred the royal disfavor by his opposition to the King's marriage with Anne Boleyn and his steadfast refusal to take the oath required by the Act of Supremacy as against his conscience. He was executed on July 7, 1535, after a trial which the writer in the "Britannica" describes as a "judicial murder."

Sir Thomas More's legal career began with his admission to Lincoln's Inn after a two years' course at New Inn, an Inn of Chancery. He soon became undersheriff of London, at that time an important judicial office. Two years later he distinguished himself in parliament by his daring opposition to a demand for money by Henry VII. He withdrew from public life for a time but later returned and practiced his profession with great success. His income, we are told, probably indicated as high a station as £10,000 a year at the present time. He attracted Henry VIII's attention by his successful conduct of a case against the crown in a Star Chamber procedure.

Honors followed quickly. In 1521 he was appointed treasurer of the Exchequer and two years later he was made Speaker in Parliament, where he was firm in favor of the popular cause. He was soon appointed Chancellor of the Duchy of Lancaster, and later became Lord Chancellor. The appointment was received with public favor, which was fully justified by his conduct as a judge. Later came his loss of royal favor for his adherence to his religious convictions as to papal jurisdiction and finally the mock proceedings which sent him to the block.

The Guild of Catholic Lawyers of New York City took cognizance of the canonization at a meeting held in the Waldorf-Astoria on the evening of May 20.

Centennial of Death of Chief Justice Marshall Commemorated

STRIKING exercises in commemoration of the centennial of the death of Chief Justice Marshall were held on May 11 at Richmond, Va. The centennial really falls on July 6, but the ceremonies were advanced in order to give members of the American Law Institute and officials of the American Bar Association, both of which bodies were in session at Washington early in May, an opportunity to attend.

The ceremonies included the placing of a wreath on Marshall's tomb in Shockoe Cemetery by Hon. Scott M. Loftin, president of the American Bar Association; a brief address at the grave by Dr. John Stewart Bryan, president of the Virginia Historical Society; an address by Hon. James M. Beck, former Solicitor General of the United States, considered an authority on Marshall's life and work, before an audience of judges, lawyers and legislators in the Thomas Jefferson High School, and a reception at the John Marshall House, given by the John Marshall House Committee of the Association for the Preservation of Virginia Antiquities.

Mr. Beck's address is printed in full in this issue of the Journal. It was the climax of the ceremonies, according to the account in the Richmond Times-Dispatch of May 12. At the meeting in the High School Building, where it was delivered, there was a general introduction by Hon. Murray M. McGuire, president of the Richmond Bar Association. Mr. Beck was introduced by Hon. Preston W. Campbell, Chief Justice of the Supreme Court of Appeals of Virginia.

The memorial services were conducted under the joint auspices of the Bar Association of the city of Richmond, the Association for the Preservation of Virginia Antiquities, and the Virginia Historical Society.

Hon. Clarence E. Martin, former president of the American Bar Association, has sent us a copy of a document which tells of another tribute to the memory of the great Chief Justice. It sets forth the action taken by the

Scott M. Loftin, President American Bar Association, placing wreath on tomb of Chief Justice Marshall at ceremonies in commemoration of Centennial of his death. Others in picture, left to right: Murray M. McGuire, President, Richmond Bar Association; Chief Justice Preston W. Campbell, of the Supreme Court of Appeals of Virginia; James M. Beck, former U. S. Solicitor General; Bishop H. St. George Tucker, of Diocese of Virginia; John Stewart Bryan, President of College of William and Mary, and Chairman of Executive Committee Virginia Historical Society.

Virginia Court of Appeals at its first meeting after the death of Chief Justice Marshall—held in Lewisburg in Greenbrier County, now West Virginia, on July 22, 1835. It should be of particular interest at this time.

Virginia: At a Court of Appeals held at the Courthouse in Lewisburg, Greenbrier County, on Wednesday, July the 22nd, 1835, the Court met pursuant to adjournment.

Present the Honorable Henry St. George Tucker, President,
Francis T. Brooke
and
William Brockenbrough

On the motion of John H. Peyton, Esqr., it is ordered that the proceedings of a meeting, held at the Court House on this day be entered on the records of this Court.

At a meeting of the Judges and members of the bar and officers of the Supreme Court of Appeals of Virginia, convened at Lewisburg, to express their respect for the eminent abilities and moral worth of the late Chief Justice of the United States, and their sorrow for his death.

On the motion of the Honorable Henry St. George Tucker, President of the Court of Appeals, sustained by John H. Peyton, Esqr., the Honorable Francis T. Brooke was unanimously called to the chair, whereupon he addressed the meeting as follows:

"Gentlemen, there is no one here who feels more deeply the nation's loss in the death of the Chief Justice of the United States than myself. I knew him well. It was my fortune—good fortune, I call it, to practice law at the same bar with him, until he was elevated to the exalted station which he filled with so much ability—and can testify to his many virtues. I think the highest honors ought to be paid to his memory that a nation's gratitude can bestow. I should therefore have preferred that the President of the Supreme Court of his natve State should preside at this meeting, who presides in that Court with so much ability; but if it be the pleasure of this meeting to confer that honor on me I shall accept the appointment, with sincere grief for the occasion."

Sidney S. Baxter was then appointed Secretary.

John H. Peyton, Esqr., submitted the following resolutions which were unanimously adopted:

1st Resolved, that we deeply lament the loss which the nation has sustained in the death of John Marshall, late Chief Justice of the Supreme Court of the United States—a man whose pre-eminent ability, perfect integrity and devoted patrotism, evinced through a long life of usefulness, both in public and private stations, will be always recollected and affectionately cherished by his countrymen.

2nd Resolved, that in token of our veneration for the memory of the deceased, we will wear the usual badge of mourning for thirty days.

3. Resolved in accordance wth the suggestion of the bar of Philadelphia. The bar attending the Court of Appeals at Lewisburg will cheerfully cooperate with the members of the profession in the United States in erecting a monument to his memory in the city of Washington.

4. Resolved, that the Supreme Court of Appeals of Virginia now in session at this place be requested to insert the proceedings of this meeting upon their minutes, as a means of perpetuating this testimonial of our respect for the deceased.

5. Resolved, that the foregoing resolutions be published in the Lewisburg Allighanian, and in the Constitutional Whig and in the Richmond Enquirer.

On motion, Resolved that this meeting do now adjourn.

Sidney S. Baxter, Scy.
Francis T. Brooke.

Ordered that this Court be adjourned until 11 o'clock tomorrow morning.

H. S. G. Tucker.

State of West Virginia.

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, hereby certify that the foregoing is a true and correct copy of the proceedings held on the 22nd day of July, 1835, as the same appears from the order book of the Court of Appeals of the State of Virginia, designated "Orders No. 1," at page 79, which order book is in the custody of said Clerk's Office.

Given under my hand this 22nd day of April, 1935, at Charleston, West Virginia.

(Signed) WM. B. MATHEWS,
Clerk Supreme Court of Appeals of West Virginia.

PROPOSED AMENDMENTS

TO THE CONSTITUTION AND BY-LAWS OF THE AMERICAN BAR ASSOCIATION, WHICH HAVE BEEN CONSIDERED AND APPROVED BY THE EXECUTIVE COMMITTEE, TO BE PRESENTED AND ACTED UPON AT THE 58TH ANNUAL MEETING AT LOS ANGELES, CALIFORNIA, JULY 17, 1935.

That the Constitution and By-Laws be amended so as to do away with the Committee on Publications and to place the control of all publications, other than of the American Bar Association Journal, in the Executive Committee, said Amendments to be as follows:

(a) That Article X of the Constitution be amended to read as follows:

ARTICLE X.

Reports and Publications

All publications of the Association, except the Journal, shall be under the jurisdiction of the Executive Committee. The Annual Reports of the Association shall be free of charge to members. All other publications of the Association shall be issued upon such terms and conditions as the Executive Committee shall provide.

(b) That Section 1 of Article VIII of the By-Laws be amended by omitting the provision relating to the Committee on Publications, so that said Section will read as follows:

ARTICLE VIII.

Committees

Section 1. Appointment and Tenure.—The following committee shall be appointed annually by the President, each to consist of five members (unless otherwise specifically indicated herein), to serve for the year ensuing and until their respective successors are appointed. The President shall designate the Chairman and shall announce the appointments to the Secretary, who shall give notice to the persons appointed.

On Admiralty and Maritime Law;
On Aeronautical Law;
On American Citizenship;
On Commerce;
On Commercial Law and Bankruptcy;
On Communications;
On Jurisprudence and Law Reform, to consist of 9 members;
On Legal Aid Work;
On Noteworthy Changes in Statute Law;
On Professional Ethics and Grievances, to consist of 7 members;
On Publicity;
On State Legislation in each state to consist of two members in such state;
On Unauthorized Practice of the Law.

In addition to the aforesaid standing committees, the President shall appoint such special committees as the Executive Committee may authorize, each of such special committees to consist of five members (unless otherwise specifically indicated by the Executive Committee), to serve for one year ensuing and until their respective successors are appointed, and to perform such duties as the Executive Committee shall prescribe. The President shall designate the Chairman and shall announce the appointments to the Secretary, who shall give notice to the persons appointed.

(c) That Section 14 of Article VIII of the By-Laws, which Section defines the duties of the Committee on Publications, be repealed.

(d) That Section 25 of Article VIII of the By-Laws be amended by striking out the words, "Committee on Publications," and inserting in lieu thereof the words, "Executive Committee," so that said Section will read as follows:

Section 23. Printing of Reports of Committees.—All committees may have their reports printed by the Secretary before the annual meeting of the Association unless otherwise ordered by the Executive Committee; and any such report containing any recommendation for action by the Association, shall be printed, together with a draft of a bill embodying the views of the committee, whenever legislation shall be proposed; but any matter previously printed and distributed may be omitted in the discretion of the Eexecutive Committee. Such reports shall be distributed by mail by the Secretary to all members of the Association at least thirty days before the annual meeting at which such reports are proposed to be submitted; *provided, however,* that when a Section of the Association or the National Conference of Commissioners on Unifrom State Laws reports the work and recommendations of such Section or Conference of Commissioners on Uniform or acted upon at any meeting of the Association immediately following or held contemporaneously with such meeting of such Section or Conference, without being previously distributed as above provided.

FRANCIS J. CARNEY, CHAIRMAN OF THE STANDING COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, ACTING FOR THE COMMITTEE, PROPOSES THE FOLLOWING AMENDMENTS OF SECTION 13, ARTICLE VIII OF THE BY-LAWS OF THE ASSOCIATION:

1. That Article VIII, Section 13, subsection (b) be amended by inserting after the words "local bar association" the following: *"or by any public official before whom lawyers appear."*

2. That sub-section (c) of said Section 13 be amended to read as follows: "(c) Be authorized to hear charges respecting the professional misconduct and, except as hereinafter limited, the judicial misconduct of any member of the association upon complaint preferred. The committee's procedure in such matters shall be in accordance with rules adopted and approved as provided in subsection (e) of this section. After a hearing thereon the committee may recommend to the Executive Committee the public or private censure or expulsion of such member and such censure or expulsion shall become effective on the Executive Committee's approval of such recommendation. The committee shall not consider questions of judicial decision or discretion."

3. Add a new subsection designated as (d) to read as follows: "be authorized to appoint a lawyer and direct him to investigate matters involving possible misconduct of such members coming to the attenton of the committee by complaint or otherwise, to report to the committee concerning same and in his own name to prefer and prosecute charges of such misconduct."

4. Redesignate present sub-sections (d) and as sub-sections (e) and (f).

Francis J. Carney, Park Square Building, Boston, Massachusetts.

Washington Letter

Closing of Bank Receiverships

THE last of the conservatorship banks which is to be reopened was opened in February of this year, according to an announcement of the Comptroller of the Currency made a few days ago. The number of national bank receiverships remaining at the end of March, 1935 was 1,539, eight such receiverships having been closed during March. At the end of April the number has been reduced to 1,524. It is the Comptroller's plan to release statements monthly showing the bank receiverships terminated.

One hundred per cent of the principal, with interest in full at the legal rate, was paid to all depositors and other creditors of four out of the eight banks whose receiverships were closed during March. Each of these four banks also had a small amount left to distribute among the stockholders, which they received "together with the assets remaining uncollected." The dividend rate which the other four banks paid to preferred creditors is not shown in the Comptroller's statement. The average rate paid to depositors of the eight banks for which the receiver-

ships were closed in March was 75 per cent.

In April of this year there were 13 bank receiverships closed through liquidation and four banks which had been in receivership were restored to solvency. Out of this group of 17 banks, one paid 100 per cent plus interest in full to all depositors and creditors and $20,000 to the stockholders. Two others paid 100 per cent of the principal amount due to all depositors and other creditors; and in addition three of the receiverships paid 100 per cent to secured creditors.

For the remainder of this list of banks the Comptroller does not state what rate the secured and preferred creditors received. The average received by depositors of these 17 banks liquidated or restored in April was 67.5 per cent. In several instances depositors also were given participation certificates in certain trusteed "assets."

Retirement of Supreme Court Justices

Although a similar bill (H. R. 5161) which he introduced had failed to pass the House a month and a half earlier, Chairman Hatton Sumners of the Judiciary Committee, on April 29th, again introduced a bill (H. R. 7782) providing "That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retirement now granted to district judges and judges of the courts of appeal."

The principal difference was that the earlier bill indicated what the "rights and privileges with regard to retirement" were, viz., that those members who had served ten years on the Court and had attained the age of seventy years might retire upon the salary of which they then were in receipt from regular active service on the bench. The bill which was defeated provided also that "the President shall thereupon be authorized to appoint a successor." There is no such authorization in the later bill. Query: Without such a provision, could the President legally appoint a "successor", the "retiring" member not resigning but still being a Justice of the Court?

Bankruptcy Rules Amended and Supplemented

The Supreme Court has amended two of the General Orders in Bankruptcy and added one new Rule, No. 52, effective May 13, 1935.

Rule 29 is amended only by adding a reference to Section 77B (11 U.S.C.A. Sec. 207) in the last sentence, stating to what proceedings "this general order shall not apply." The effect of this amendment is to except proceedings under the corporate reorganizations section, which was added to the Act June 7, 1934, from the rigid requirements of Rule 29, as to how moneys deposited as required by the Act shall be drawn from the depository and the records which shall be kept thereof. Previously there had been excepted from the requirements of this rule only Section 77 (11 U.S.C.A. Sec. 205) which is the subject: reorganization of railroads engaged in interstate commerce, added March 3, 1933.

Rule 48, paragraph 4, as amended changes in some respect the provision for determining the commissions of the referee and of the custodian or receiver. It provides that their commission—in cases of the type covered by this Rule 48, viz. proceedings under section 74 of the Act (11 U.S.C.A. Sec. 202), i.e., in compositions and extensions—"shall not exceed those payable to referees and receivers under sections 40 and 48 of the Act [11 U.S.C.A. Secs. 68 and 76] in the event of a composition in bankruptcy."

The amended rule provides also that the amount of the debts whose maturity is to be extended shall be included for the purpose of calculating commissions as part of "the amount to be paid creditors" within the meaning of aforesaid sections 40 and 48 of the Act. This amended paragraph provides further that "if the compensation so computed shall appear to be in excess of what is fair and reasonable it shall be correspondingly reduced, the intent of this provision being that the amount of such fees shall be subject at all times to the approval of the court."

The final sentence of this paragraph 4 of Rule 48—as to the referees returning to the estate commissions previously received and then getting the usual commissions on the disbursements to creditors, if the estate proceeds to liquidation—is retained without change as it previously stood, i.e., in the rules promulgated April 17, effective April 24, 1933.

Rule 52 is an additional rule, applying to "proceedings under section 77B of the Bankruptcy Act", 11 U.S.C.A. Sec. 207, it being the subject of corporate reorganizations. This rule has three numbered paragraphs.

Paragraph 1 requires in proceedings of this kind that the clerk of the district court shall forthwith transmit to the Secretary of the Treasury numerous papers listed, which include the petition and other pleadings, the orders and the plan of reorganization. "The clerk shall also transmit to the Collector of Internal Revenue for the district in which the proceedings are pending copies of the petition or answer." The Secretary of the Treasury may notify the clerk that the United States has no interest in the proceeding "whereupon the clerk may dispense with the transmittal of further papers. All papers filed with the court shall have attached thereto such copies as the clerk may require for carrying out this general order."

Paragraph 2 of Rule 52 provides that any order fixing a time for confirming a plan which deals with interests or claims of the United States shall include a notice to the Secretary of the Treasury of at least thirty days.

Paragraph 3 states that this general order, number 52, "shall not apply to any action heretofore taken"; and that the District Court shall not be deprived of jurisdiction of the proceeding, nor its action be invalidated, by failure to comply with any provision of this rule, but that such failure "shall be the subject of such consideration and remedial action as justice may require."

The Justice Holmes Request

Among the suggestions made in Congress for use of this bequest was that of Senate Joint Resolution 107, which Senator Joseph T. Robinson, of Arkansas, introduced by request, to authorize the acceptance on behalf of the United States of the bequest of the late Oliver Wendell Holmes, formerly an Associate Justice of the Supreme Court of the United States, for the purpose of establishing a collection of the portraits of the former Justices of that court and for the creation of scholarships for selected law students.

The President, in a message sent to both the House and the Senate, spoke briefly in appreciation of this gift to the nation and then commended to the Congress "that the bequest of Mr. Justice Holmes be not covered into the general fund of the Treasury but that it be set aside in a special fund at this time, and at a later date be devoted to purposes which will effectively promote the contributions which law can make to the national welfare. Once it is decided that the Holmes bequest be set apart for special use the precise object may await ample deliberation. A select committee of the Congress, acting in collaboration with a committee of the Supreme Court of the United States, will doubtless evolve the wisest uses to which this noble bequest should be put."

Sinews of War or Sinews of Crime

There is sustenance for thought in the recent statement by the Department of Justice showing cases reported to the Federal Bureau of Investigation, from January 1, 1933 to May 13, 1935, of firearms and ammunition stolen from National Guard Armories and similar institutions. There were 174 cases re-

(*Continued on page* 390)

AMERICAN LAW INSTITUTE REACHES THE POINT OF MAXIMUM PRODUCTION

Publication Schedule Being Carried Out on Time—Final Restatement of Trusts and of Double Jeopardy Statute Approved for Official Publication at Thirteenth Annual Meeting at Washington—Production of a Model Code of Criminal Law, in the Broadest Sense, Now Being Considered—Chief Justice Hughes Makes Announcement of Great Importance concerning Supreme Court's Rule-Making Plans in Course of Address to Institute—President Wickersham Speaks of Certain Additional Fields of Possible Usefulness—Institute Prepares to Utilize Valuable By-Products, according to Director Lewis—Tentative Drafts Considered—Reports of Director and of Adviser on Professional Relations Presented

AN efficiency engineer would greatly approve the manner in which the American Law Institute's production program is being carried out on schedule time. At the thirteenth Annual Meeting, held at Washington, D. C., May 9-11, the proposed final draft of the Restatement of Trusts was presented, considered and approved, subject to certain minor changes which the Reporter was authorized to make. Parts of the Restatements of Property, Torts, Restitution and Unjust Enrichment, and Sales of Land were also presented in tentative Draft form and discussed, the Reporter making note of the various suggestions offered, for the purpose of further consideration. In addition, the proposed Final Draft of a Statute on "Double Jeopardy" was approved.

The production program, according to the report of Director William Draper Lewis, calls for submitting to the next meeting proposed Final Drafts of the first two volumes of the Retatement of Property and the complete Restatement of Restitution and Unjust Enrichment. After that meeting the work of completing the program as it now stands will be confined to two subjects, Property and Torts. The maximum of work on the Restatement will be represented by the work which was done during the past year and that which will be done during the year to come.

By-Products to Be Utilized

Still looking at the undertaking from the standpoint of the efficiency engineer, it may be added that he would probably be greatly struck by the Institute's evident intention to follow the example of the great industrial enterprises and make use of its many valuable by-products. In the course of the Restatement of the Common Law it was natural that the various Reporters and their Advisers should come upon many instances in which the need of statutes to bring the law into harmony with present conditions was very evident. It was also plain that, by reason of their work, they were specially fitted to make suggestions in that direction and that a real opportunity for public service was here presented. We will let Director Lewis's Report elaborate the subject:

"From the beginning of our work on the Restatement it has been suggested by many of our members and others that each group working on a subject should report the statutes, if any, which they believe usefully could be enacted to correct defects in our law as the judicial decisions and existing statutes require us to restate it. It was not practicable during the first stages of our Restatement work to carry out any such plan. Even today, it usually would be impossible for a group while working on the Restatement of a subject to devote any time to its statutory reformation. When, however, a group nears the completion of a subject or the division of a subject on which they have been working it often would be possible to prepare drafts of such statutes.

"The Executive Committee, therefore, communicated with members of the Editorial Force asking them to suggest any act in their respective fields which they think should be drafted. As a result the Committee received a considerable number of suggestions and also evidence of a distinct enthusiasm for the work on the part of many members of the Editorial Force. The Committee, without indicating any opinion as to whether the acts suggested, or any one of them, should be drafted, have included in their Report the majority of the suggestions received. As the Committee believe that we should, as opportunity occurs, undertake this work as a complement to the work on the Restatement, they are anxious to receive from our members and others further suggestions."

President Wickersham's address called attention to certain undertakings which could hardly be called by-products of the Institute but which are certainly closely connected with its work. Speaking of the deep-rooted desire of the American lawyer, when confronted with the statements of the existing law, to be able to "go back through the welter of cases and put himself in the position of those who have produced these formulations of the law, and revise or verify the accuracy of their conclusions," he said:

"The Restatements are products of group work. They represent, not merely the conclusion of one mind, but the agreement of many. To write a Commentary or Treatise which would represent such concurrence is quite impracticable. That must be the work of one, or, at most, two persons. Such Commentaries or Treatises are already being produced by individual effort. Williston on Contracts and Mechem on Agency were published before the Restatements were formulated. Professor Beale has just published a treatise on Conflict of Laws

which is expressly recommended to the profession as 'a complete commentary on the Restatement of Conflict of Laws.' It is understood that Messrs. Seavey and Bohlen intend to publish books on Agency and Torts, respectively, when their work on Restatements is finished, and Mr. Powell has prepared explanatory notes on Property, as the work of restating that subject has progressed, which, I am informed, he contemplates publishing when the Restatement is completed. Thus the desire of the Bar for reference to and discussion of decisions will be gratified, although the Institute will not, in any way, be responsible for such treatises."

New and Fascinating Horizons Appear

As the Institute approaches the summit and begins to descend the slope to the end of its present publication program, new and fascinating horizons appear. In particular, the project for the production of a model Code of Criminal Law, using that term in its widest sense, as including "not only the rules of substantive law and procedure but also the organization and administration of courts and other agencies for the prevention, detection and prosecution of crime and delinquency," looms up as a great undertaking to which the tried machinery of the Institute may be applied. This was recommended in a report by an Advisory Committee on Criminal Justice and approved by the Executive Committee in its report to the Council on the "Future of the Institute." The Council has instructed the Executive Committee to take steps to ascertain if it is possible to secure sufficient financial assistance to enable the Institute to undertake this important work.

This is the subject in which President Roosevelt is particularly interested and which he suggested as a worthy undertaking for the Institute in a letter which was read at the annual meeting in 1934. He sent a letter to the meeting recently held in which he again expressed his interest in it and his conviction of its importance. It reads as follows:

THE WHITE HOUSE

Washington

TO THE MEMBERS OF THE INSTITUTE:

Last year I had the pleasure of sending a word of greeting to the twelfth annual meeting of The American Law Institute. On that occasion, I took the liberty of making a suggestion—the suggestion that while you continued to carry forward the clarification and simplification of the common law through your great project of "Restatement", you should begin to give serious consideration to work of equal importance in the field of the criminal law.

I am happy to learn that my suggestion commended itself to you and that a committee composed of eminent lawyers, economists, sociologists, psychiatrists and other experts in the allied social sciences was appointed by your Council to advise you on the work which you can usefully do in this field.

I am deeply interested to learn that you have received from this committee a report which has been approved by your Council and which recommends that you prepare and from time to time publish parts of a proposed code of criminal law, using that expression in its widest sense. I expressed in my letter of last year my conviction that the adaptation of our criminal law and its administration to meet the needs of a modern, complex civilization is one of our major problems. I feel that the type of work proposed by your committee will, if executed with scientific care, be a valuable contribution to our progress towards the solution of the crime problem, and I accordingly hope you will be able to see your way clear to carry through such an important public service.

These meetings of The American Law Institute in Washington emphasize the public responsibility of the Bar, not merely to practice the law, but to maintain its vitality and carry forward its growth and improvement by disinterested scientific work. In a country like ours, where so much depends upon the spirit and breadth of vision with which the law is administered, it is heartening indeed to witness this recognition of their public obligations by so many of the outstanding leaders of the Bench and Bar.

I accordingly extend my warm and cordial greetings to your membership and wish to say that I shall be very glad to receive a committee from the Institute if there are any matters upon which you especially wish to confer with me.

Very sincerely yours,

(Signed) FRANKLIN D. ROOSEVELT.

Chief Justice Hughes Makes Important Announcement

Chief Justice Hughes made an announcement of major interest to the profession in the course of his address to the Institute at its opening session. Referring to the legislation passed at the last session of Congress authorizing the Supreme Court to adopt rules for the conduct of the business of the Federal Courts on the law side, and also "to unite the general rules prescribed by it for cases in equity with those in actions at law, so as to secure one form of civil action for both," he declared the purpose of the Court to adopt the latter course. The cogent reasons which induced this decision are set forth in the Chief Justice's address, printed in full in this issue.

The opening session witnessed the customary full attendance and lively interest in the proceedings. After so many years of work the membership seems as alert and active as ever. The announced early attainment of the maximum production and the approaching completion of the present program do not seem to have suggested any relaxation of effort. They have rather stimulated interest in what lies beyond—in the next "work of noble note, not unbecoming men" who have performed the present task so well.

President Wickersham, looking fit and fully recovered from a recent serious illness, presided at the first session. His address dealt with the progress of the work, suggestions as to the future activities of the Institue and, in particular, with the evident desire of the practicing lawyer for some matter supplemental to the Restatements in their present form. In this connection he reported a resolution recently adopted by the Council declaring the subject a matter of urgent consideration and requesting the Director and Executive Committee to consider and report what practical ways can be suggested for satisfying the policy thus announced. President Wickersham's address is printed in full in this issue.

Four important reports were presented at this session: by William Draper Lewis, Director, Herbert F. Goodrich, Adviser on Professional Relations, and two in relation to the future work of the Institute. One of the two reports last mentioned was that of the Advisory Committee on Criminal Justice, referred to above, and the other was the report of the Executive Committee to the Council. "On the Future of the Institute."

Report of Director Lewis

Director Lewis's Report, after calling attention to the present stage of the Institute's work, the progress on State Annotations, and the present Publication Program, gave the high points of the two Reports in relation to the Institute's future

work. Of the Report of the Advisory Committee on Criminal Justice he said:

"The appointment of the Advisory Committee on Criminal Justice marks a distinct advance in what may be termed the mechanics of scientific and practical work for the improvement of the law. We felt, in view of the nature of the subject on which we needed advice, that the Committee should not be composed exclusively of lawyers, but that among its members should be representatives of other social sciences—economists, sociologists, psychiatrists, etc. If you will examine the names of the members attached to the Report you will find notable members of these disciplines. We were warned that it would be very difficult for the lawyer and non-lawyer to work together; that they would not speak each other's language, and would have antagonistic approaches to the problems involved. Frankly, I had an instinct that this, to use good American, was 'bosh.' And so the event proved. The Committee and its Sub-Committee met during last spring, summer and fall. I had the pleasure of presiding at all these meetings and I have never had an easier presiding job. Of course, there were different points of view, or rather, different emphases on many matters; but from the beginning of the discussions there was no line of cleavage between the lawyers and the non-lawyers. Working as a harmonious group, each freely expressed his own opinion; just as we hammer out by group discussion the Restatements, they hammered out a unanimous Report. If I noted any difference between lawyer and non-lawyer as such, it was that the latter was somewhat more meticulous in requiring accuracy of expression.

"It is important to emphasize this co-operation. No one could attend as I did the meetings of the Committee without being convinced that we cannot do the large and important work it has recommended us to undertake properly without co-operation between leading members of our profession and able representatives of other social sciences. And it is a large and important work which they have recommended the Institute to do: Nothing less than the production of a model Code of Criminal Law, using that term in its widest sense as including the administration of criminal justice generally; 'not only the rules of substantive law and procedure, but also the organization and administration of courts and other agencies for the prevention, detection and prosecution of crime and delinquency . . .' They lay emphasis on the fact that 'the Institute should endeavor to create a Code more nearly suited to modern social and economic conditions', the basic aim of which should be 'the protection of society.'

Model Code of Criminal Law Recommended

"They do not recommend that we undertake a Restatement of the existing criminal law. They point out, however, that 'the existing criminal law, constituting, as it does, a part of the valuable heritage of the common law and expressing, as it does, the day to day growth and development of public opinion regarding crime, must be recognized as one of the fundamental bases upon which the work shall proceed.' They express the opinion that 'the analysis of the data revealed by the studies undertaken in preparing the Code should disclose the fundamental soundness of many of the common law definitions and principles', and that 'it is to be expected, therefore, that the Code, when finally produced, will consist in considerable degree of a Restatement clarifying the existing law.' Nevertheless, they believe the task to be undertaken 'involves a fundamental re-examination, not only of the legal, but of the pertinent extra-legal bases of the criminal law as well as its aims, administration and effectiveness in action.'"

Director Lewis, after giving some further information on the subject, stated that the project had been unanimously approved by the Council, which had directed the Executive Committee to find out whether the necessary financial support could be secured. He expressed his personal belief that "if this work can be arranged for, the Institute will perform a great public service, not the least of which will come from the education of ourselves, so that we may give to the people of the United States the informed leadership which they have a right to expect from us as lawyers."

Speaking of the Report of the Executive Committee to the Council on the Future of the Institute, he said that it dealt with two matters: (1) future work on the Restatement; that is, the Restatement of subjects not included in the present Publication Program and, in connection therewith, the creation of a fund to encourage scholarly and scientific research; (2) the production of model acts other than acts in the field of criminal justice. Under the first head, the Committee had naturally considered the expenditure of the $100,000 which the Carnegie Corporation had set aside for the Institute's use when a plan satisfactory to the Trustees was presented to them.

As pointed out, Director Lewis continued, the two subjects which, in addition to those the Institute is now working on, will complete a "definite, coherent and essential part" of a Restatement of the Law, are Corporations for Profit and Security, "meaning by 'Security' all transactions in which the performance of a promise by a principal is secured either by the promise of another or by lands, chattels or choses in action. It therefore includes Suretyship, Pledges, Conditional Sales, Mortgages on Real Property, etc. Corporations for Profit, as its name indicates, is confined to business corporations as distinguished from public corporations on the one hand and eleemosynary corporations on the other. It is a subject in that field of the law which relates to business associations, the other subjects in that field being Partnerships, Common Law Joint Stock Companies and Business Trusts."

There is no question as to the importance of a Restatement of both Corporations for Profit and Security, Director Lewis continued. The present estimate is that a Restatement of either subject will cost $100,000. However, before making a decision, the Executive Committee desired further information, and it had authorized and directed the Director to make arrangements to procure the following: (1) A program of work in the field of Security; (2) a program of Work in the Field of Cooperative Effort (which includes not only business associations but other public and private associations); (3) the preparation of a Restatement of a limited topic in the field of Cooperative Effort and possibly a similar Restatement in the field of Security designed to exhibit a suggested treatment of matters in which statutes have modified the common law or provided detailed rules for the appli-

cation of a common law principle. These are to be submitted in the latter part of the summer or early fall.

"The Report," Director Lewis continued, "also deals with the subjects other than Security and those in the field of Co-operative Effort which, in the opinion of the Executive Committee, should be restated as soon as the necessary funds are available and we are also in a position to be certain that it is possible to secure a Reporter and group of Advisers capable of producing the kind of Restatement required in a reasonable time. Among the most important of these subjects, besides certain divisions of the Subject Property as Conveyancing, Landlord and Tenant and possibly Wills, are Persons, including domestic relations, Public Carriers and probably any agency for intercommunication by telegraph, telephone or radio, certain parts of the subject Taxation, and the subject of Admiralty. The Committee are of the opinion that in dealing with the subject Carriers and similar subjects all matters pertaining to the public regulation of rates and services by Public Service Commissions should be excluded."

The Director also called attention to the Executive Committee's statement of the need of "a fund from the income of which we could encourage the study, research and creative work in those subjects which we hope to restate but in which we are not now prepared to begin work. Such a fund would not only enable us properly to prepare for future Restatement Work, it should, apart from that work, result in the production of useful legal articles, monographs and commentaries on matters of practical importance." He then spoke of the "Statutes Suggested by Our Restatement Work," referred to as by-products in the beginning of this account, which were also dealt with by the Executive Committee, and to that Committee's emphasis of the need, not for a Restatement of the Law of Evidence, but for an Act on the subject which would bring the law on Evidence in this country more nearly in accord with present-day needs. He closed his report with a statement concerning the Institute's "Relations with the American Bar Association and the National Conference of Commissioners on Uniform State Laws."

Report of Adviser on Public and Professional Relations

Mr. Goodrich's report spoke of the various comments and criticisms which had been and were being made on almost every phase of activity involved in the Restatement of the Law. All these were welcome, no matter what view they expressed. "The Institute has now offered to the professional public," he said, "all or part of its work in four fields: Contracts, Agency, Torts and Conflict of Laws. Subject to the action of this meeting Trusts will go out with your approval. I can think of no more conclusive proof of our failure to make any impression upon the law than that these volumes should be received in sullen silence by the profession. Until we lose both courage and voices, every judge on the bench and every lawyer at the bar will certainly feel free to announce his dissent whenever he disagrees with anything. And the privilege by one scholar to belabor another is one of the things which add zest to the academic life both in the law and other fields of learning. Appraisal, approval, criticism and disagreement we should expect if what we are doing is important enough to be noticed."

Under the head of "Code of Criminal Procedure," he said that the question of how far the Institute could or should go in follow-up work with the Code of Criminal Procedure and other Model Acts in the field had always been a difficult one. However, all these difficulties had disappeared through the admirable cooperation of the American Bar Association, which had made the improvement of Criminal Procedure one of the important divisions of its National Bar Program and the Institute's Model Code as one of the main things to which the attention of the Bar is directed.

Of the annotation program, he said that it was a success. "The cooperation," he continued, "which the Institute has received from State Bar Associations and other friends of our work in the various States is fully as remarkable as the cooperative effort which is producing the Restatement. This statement is made advisedly and not out of an excess of enthusiastic appreciation. The preparation of the Restatement is a unified undertaking most capably administered by an able and experienced Director who is in touch with work at every stage of its progress. The production of the local annotations cannot be unified; it must be carried on by voluntary groups in widely scattered States. Necessarily the vigor and rate of progress will vary with that of the group which has the work in charge. But when we put together on the shelves the volumes of State annotations which have appeared and realize that much of this came through voluntary help of interested friends, we will conclude that they represent a very remarkable achievement in cooperation for the improvement of the law.

Progress on State Annotations

"The production of these annotations is not keeping up with the production of units of the Restatement. Nor can it possibly be expected to do so. Last year the Institute brought out Torts and Conflict of Laws. Certainly no one will ever think it possible to have forty-eight committees in forty-eight states each bringing out a local annotation in these two subjects in one year. In many States it would take an intelligent worker almost this long to disregard the negligence cases which are of no help to him in making an annotation to the second volume of Torts. The continued increase in the units of work completed by the Institute make the annotations an increasingly difficult one if annotations in all subjects are to be supplied for all States.

"The final answer to this problem has not been worked out. It does not need to be worked out for the occasion of this meeting. The Institute appreciates the help which it has had from its friends which has made possible the production of State annotations now completed or in the course of completion. It is a creditable list in size. It is even more creditable in the quality of the material produced. The available annotations are proving beyond a doubt from the evidence which we have received from users of the Restatement a highly valuable means of increasing the usefulness of the Restatement in the American law office."

Mr. Goodrich concluded his report with a sum-

mary of the annotation work that has been done and is now being done in the various States.

The reports of the Treasurer, George Welwood Murray, and of the Committee on Membership, of which George E. Alter is chairman, were presented and approved. At the same session all members of the Council whose terms expired at this time were reelected. Newton D. Baker had previously presented his resignation and Judge George T. McDermott, of the United States Circuit Court of Appeals, was chosen to fill the vacancy.

The remainder of this and the following sessions was devoted to the customary work of considering proposed Final and Tentative Drafts. President Wickersham presided at the morning session on Thursday, Friday and Saturday, Judge Learned Hand at the session on Thursday afternoon, and Mr. George Wharton Pepper at the Friday and Saturday afternoon sessions. The first to be taken up was the proposed Final Draft of the Restatement of Trusts, and Mr. Austin W. Scott, of Harvard University Law School, Reporter for this subject, took the platform to go through the customary procedure of explanation, and, where necessary, of defense.

There was quite a lively debate over a proposed substitute for a Comment in Tentative Draft No. 2 of the subject, which stated that "a trust company which makes a general deposit of trust funds in its own banking department violates its duty to the beneficiary," many members adhering to the principle as thus announced. However, the Reporter and a majority of his Advisers were of the opinion that a substitute should be adopted declaring the law to be that such an act was not necessarily a breach of trust, although in so doing it is dealing as an individual with itself as trustee. "Such a deposit is not improper if under all the circumstances it was reasonable and prudent to make the deposit. The mere fact that the trust company or bank makes a profit through the use of money on general deposits with it does not make the deposit improper. Such a deposit is improper, however, if the trust company or bank did not act for the interest of the beneficiaries in making the deposit." The Institute adopted this view of the matter.

After further discussion of various other sections, the proposed Final Draft was approved, subject to certain minor changes and modifications to be made by the Reporter with the approval of the Council. At this point Director William Draper Lewis rose to congratulate the Reporter on the completion of a task which had engaged his attention for so many years, and the members present added their hearty applause to this tribute to Mr. Scott.

Institute Considers New Subject

Tentative Draft No. 1 of the Restatement of the Sales of Land introduced a new subject to the attention of the members. The discussion of the various sections aroused particular interest and demonstrated a high degree of familiarity on the part of many members with the special questions presented. Samuel Williston is the Reporter for this subject but was unable to be present. Mr. Sidney P. Simpson, Associate Reporter, acted in his stead, explaining various sections in answer to questions and comments from the floor.

Consideration of the Proposed Final Draft of the statute on Double Jeopardy resulted in its approval as another of the completed pieces of Work of the Institute. Mr. William E. Mikell, of the University of Pennsylvania Law School, Reporter, explained its provisions. The principle followed in the proposed Act is that "only an acquittal or conviction—not jeopardy of conviction or punishment—is a bar to a second prosecution." The Act is extensively annotated in the Final Draft and those interested will find a full statement of the authorities on all questions raised in connection with this effort to provide a clear, reasonable and modern statute on this important subject.

Mr. Richard R. Powell, of Columbia University Law School, took the platform as Reporter to explain Tentative Draft No. 6 of the Restatement of Property. The subjects covered were Chapter 12—Protection of Future Interests as Against Acts and Omissions to Act of Persons Other Than the Owner of the Possessory Interest. Chapter 13—Protection of Future Interests as Affected by Statutes of Limitations and the Doctrine of Prescription. Chapter 14—Ineffectiveness of an Interest in Its Inception and Effect Thereof Upon Prior or Succeeding Interest. Chapter 15—Termination of an Interest as Affecting Succeeding, Interests. Mr. W. Barton Leach, of Harvard University Law School, is the Special Reporter for Chapter 13 and took the platform when that was being considered.

"Those Are Fighting Words, Mister"

Section 282 of Chapter 15 perhaps provoked the liveliest debate. It states the law to be that "when a remainder is subject to a condition precedent, the termination, before such condition precedent is fulfilled, of all prior interests created simultaneously therewith does not destroy the remainder." Those are "fighting words" and seldom are they allowed to pass unchallenged. However, the statement was approved by the members. The Tentative Draft contained a note to the members stating that "the Reporter has taken the position that the early English doctrine of the 'destructibility of contingent remainders' is not a part of the present American Common Law. In other words there is now no requirement that the condition precedent subject to which a remainder is limited be fulfilled at a time not later than the end of a supporting estate of freehold."

"Restitution and Unjust Enrichment," Tentative Draft No. 1 of which was presented by the Reporter for this part of the Subject, Warren A. Seavey, of Harvard University Law School, and his Advisers, brought another subject for the first time to the official attention of the members. The topics treated were "Part 1. The Right to Restitution. Chapter 1. Mistake." In his report Director William Draper Lewis, in referring to this proposed Restatement, said that "you will note that our old friends, Quasi Contracts and Constructive Trusts, have been rechristened Restitution and Unjust Enrichment. The christening is only tentative however. We wish to know how you like the new name."

The Tentative Draft was considered section by section and various points were referred to the Reporter for further consideration. Tentative Draft No. 12 on the Subject of Torts covering Absolute Liability and Defamation, was then taken up. The Reporter, Francis H. Bohlen, of the University of Pennsylvania Law School, and Mr. Fowler V.

(*Continued on page* 389)

ADDRESS OF CHIEF JUSTICE HUGHES

CHIEF JUSTICE HUGHES said: I am glad to have another opportunity to greet the seasoned veterans who are conducting what Mr. Byrne happily described, in his address last year, as "the attack upon the uncertainty and complexity of the law." You may be assured that there will be no discharge from that war. The enemy is strongly entrenched and even seems to thrive on the attack. Reconnoitering in any direction uncovers a startling array of fresh complexities. You have many of these to deal with at this meeting in relation to substantive law, and many others await your expert attention in the field of procedural reform. May I say a few words as to procedure in the federal courts? In the Supreme Court, we are up in our work. We have heard at this Term all the cases that were ready to be heard. The Circuit Courts of Appeals are in the main abreast of their tasks. Last year, the Supreme Court promulgated rules with respect to proceedings in criminal cases in the District Courts of the United States, and in the Supreme Court of the District of Columbia, after plea of guilty, verdict or finding of guilt. I have heard no complaint as to the working of these rules and I believe that there is no excuse for any inordinate delay in the prosecution of criminal appeals.

At the Conference of Senior Circuit Judges held last Fall, the Attorney General, in connection with his report of the work of the District Courts, furnished an instructive tabulation showing the time required to reach the trial of civil cases after joinder of issue. It is gratifying to observe that undue congestion and delays are not characteristic of the District Courts as a whole, but only of certain districts where they are caused by exceptional circumstances. Thus, according to the Attorney General's summary, out of 84 federal districts in continental United States (exclusive of Alaska and the District of Columbia) there were 31 districts in which "all ready cases" are tried at the term following joinder of issue. This is also true in divisions of several other districts, and, in a considerable number of still other districts, the average interval between joinder of issue and trial was reported to be not over 6 months. The most serious congestion and delays were found in the Southern District of New York and in the Southern District of California and this condition in each case is due to the failure to provide a sufficient number of judges. That deficiency exists after fully utilizing all possible assistance by assigning judges from other districts. Such assignments are made whenever possible. It appeared that in the Southern District of New York the average interval between joinder of issue and trial in civil cases in law and equity was from 16 to 17 months, and, in admiralty, 33 months. In the Southern District of California, this average interval for all classes of civil cases was from 18 to 24 months. Now this is a condition which ought not to continue. The judges are powerless to give the necessary relief and we must look to Congress. The Conference earnestly urged that this situation in New York and California should be promptly relieved by providing additional judges. I trust that Congress will find it possible to give this relief in the near future. Only the other day I was advised by the Attorney General that there were a considerable number of anti-trust cases awaiting trial in the Southern District of New York and the delay is due to a failure to supply the necessary number of judges to keep up with the work of the court. It is idle to talk of reforms if judicial administration, which underlies the enforcement of all laws, is not kept adequate and efficient.

Since your last meeting, Congress has passed an Act of high importance with respect to procedure in the federal courts. Act of June 19, 1934; 48 Stat. 1064. This Act authorizes the Supreme Court to prescribe general rules to govern "the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law". Such rules are to take effect six months after they are promulgated and are to supersede all conflicting laws. The Act also provides that the Court "may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both". In the latter case, the united rules are not to become effective until they have been reported to Congress by the Attorney General "at the beginning of a regular session thereof and until after the close of such session". This statute was the result of long effort. For many years the American Bar Association had sought action by Congress to obtain uniformity of federal procedure in actions at law by conferring upon the Supreme Court the requisite rule-making power, similar to the power possessed by the Court as to practice in equity cases. But the proposal was strongly and persistently opposed and the final achievement in the passage of this measure is no doubt attributable to the earnest and persuasive efforts of the Attorney General.

The reasons for the opposition are well understood. In large part it is attributable to the conservative bent of many lawyers who would like to retain in the federal courts the practice with which they have become familiar in the state courts. They do not wish to be put to the necessity of learning a new system of procedure in actions at law. Apart from that natural attitude, there has been a strong feeling of a number of influential lawyers and judges in some States that their particular practice was so free from procedural difficulties and so entirely satisfactory that it should be left alone, and that they should not be exposed to a change of procedure in actions at law in the federal courts which might make matters worse instead of better. They point out that questions of practice in their districts rarely arise. That happy situation was recently described by an eminent federal judge in New England as follows: "The people in the New England States have been working out their legal procedure for over one hundred and fifty years, quietly and intelligently, and as the result shows, effectively". A similar point of view has been strongly expressed in other parts of the country. The general subject was discussed in the last conference

of the Senior Circuit Judges and it was deemed desirable that, in aid of the performance of the task assigned to the Supreme Court, full opportunity should be given for the cooperation of the Bench and Bar in the different Circuits through the adequate and helpful expression of their views. Correspondence to this end has been conducted by the Department of Justice, which has been most ready to give its assistance in every practicable manner.

In the close examination we have made of the opportunity which the statute affords, and of the weighty responsibility placed upon the Court, we have realized that the Court must decide at the outset certain fundamental questions. Shall the Court now undertake to promulgate rules for civil actions at law in the view that this will accomplish all that should be done in the improvement of procedure in civil cases in the federal courts? If not, should the Court undertake to promulgate such rules with the idea that they will be used for a time and that they shall yield as soon as possible to another system of rules providing one form of civil action and a unified procedure for law and equity cases? Is it worth while to undertake the preparation of rules simply for actions at law if, despite the magnitude of the task, its fulfillment is to serve merely a temporary purpose? What is the goal to be attained and what are the measures which should now be taken in the endeavor to reach it?

It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances. It is also apparent that in seeking that end we should not be fettered by being compelled to maintain the historic separation of the procedural systems of law and equity. That separation has long been abolished in most of the States, either by the adoption of one form of civil action or by other practical measures of administration. Those who have practiced under such a unified system would not, I think, entertain for a moment the suggestion that they should go back to the old separate methods. It is true that in certain jurisdictions, and in one with which I happen to be especially familiar, the simple form of unified procedure originally adopted came to be overlaid with procedural monstrosities due to legislative tinkering and elaboration. Such experiences have taught a lesson and in the improvement we contemplate in the federal system we shall have the advantage of the simplicity and flexibility made possible by the exercise on the part of the Court of its rule-making power.

May I recall to you the words of Chief Justice Taft: "A perfectly possible and important improvement in the practice in the federal courts ought to have been made long ago. It is the abolition of two separate courts, one of equity and one of law, in the consideration of civil actions. . . . Many states years ago abolished the distinction and properly brought all litigation in their courts into one form of civil action. No right of a litigant to a trial by jury on any issue upon which he was entitled to the right of trial by jury at common law need be abolished by the change". It is not necessary to labor the point. The formulation of rules merely for actions at law is obviously not the ultimate goal and there is no requirement of sound administration which demands at this time separate systems of procedure for civil actions in the federal courts. While such a division is readily explained as a matter of historical development, it cannot be justified as an objective in procedural reform. Of course, I am not speaking of distinctions between law and equity in the matter of substantive rights, but of mere procedure where a unified practice may be had consistently with all substantive rights.

But if a unified system of practice is the desirable end, why should we devote the vast amount of time and labor essential to the preparation of rules only to fall short of the mark and to perpetuate a distinction which serves no important purpose?

One reason that may be suggested for such a course is that the preparation of rules limited to common law cases would meet with greater favor on the part of the Bar and Bench. That, however, is a matter of speculation. It is so destitute of proof that it affords no sufficient ground for choosing a plan admittedly inadequate and temporary. I think it fair to assume that those who have been back of the movement to obtain uniform rules in common law cases have been inspired by a keen desire to improve procedure and because of that dominant motive would gladly support a plan for a unified procedure which would bring about a greater and more lasting improvement. On the other hand, those who have opposed the movement, because of a disinclination to learn new methods of practice, should be better satisfied with a unified system of federal procedure than with the provision for two systems. The burden they desire to escape will be lightened by having to learn but one system for civil cases in the federal courts instead of two. It is also apparent that they would have added reason for objection when they perceived that they were to master a new body of rules which because of their limitation to common law cases were intended to serve only as a temporary expedient and would be displaced as soon as possible. It would seem that a plan for a unified system of procedure in the federal courts should have the largest measure of support.

Another reason which has been suggested for proceeding simply with the preparation of rules for common law cases is the form which the Act of Congress has taken. It should be observed, however, that while the Court is authorized to make rules, their preparation is left to the Court's discretion. In the exercise of that discretion, the Court cannot fail to consider its responsibility in the selection of the best means to accomplish the ultimate purpose. That responsibility cannot be escaped. The Act of Congress provides that the Court "may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both". "At any time" includes the present time. And the question is what course should be taken *now*. Why should this union of procedural rules be delayed?

It may be answered that if rules for common law cases are prepared they would become effective immediately upon their promulgation, but that unified rules are not to take effect until they have been reported to Congress "at the beginning of a regular session thereof and until after the close of

such session". It should be noted that this provision does not require affirmative action by Congress in approving unified rules; it reserves an opportunity for disapproval. But the opportunity thus reserved to Congress does not require the Court to proceed with a plan which it deems to be unsatisfactory. The responsibility placed upon the Court is to prepare the rules it believes should be prepared. If a unified system is desirable, it should not be delayed through any apprehension that Congress may exercise its authority in disapproving such rules as may be proposed. If such rules would result in a desirable simplification of practice, why should their disapproval be anticipated? That matter, however, will be one for the consideration of the Congress in the light of the event. The concern of the Court is to meet fully its own responsibility in the light of the opportunity which is now presented.

After careful consideration, the Court has decided not to prepare rules limited to common law cases but to proceed with the preparation of a unified system of rules for cases in equity and actions at law, "so as to secure one form of civil action and procedure for both", so far as this may be done without the violation of any substantive right. In entering upon this task, the Court will welcome the aid of the Bench and Bar, of the Department of Justice, and of all those interested in the improvement of procedure. It is manifest, however, that the Court must itself assume the responsibility of preparing the rules. In order that the Court may be suitably aided in this undertaking, the Court will shortly announce the appointment of an Advisory Committee, responsible to the Court, which will be called upon for such assistance as the Court may from time to time require. The Committee will be in touch with all helpful agencies, with the Department of Justice, with lawyers, judges and expert students of procedure, and will be able to bring to the Court aid and advice of the highest value.

No one can fail to realize the difficulty of this task, but I am sure that the Court can count upon the most effective cooperation. I have no doubt that in that cooperation the members of the American Law Institute will be willing to take a leading part.

PRESIDENT WICKERSHAM'S ADDRESS

TO the Members of the American Law Institute: Two vacancies in the Council have occurred during the last year. Mr. James Byrne, who was a member of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, which led to the formation of the American Law Institute, and who was also one of those present at the organization meeting on February 23rd, 1923, a member of the Council from February 22nd, 1924, and Vice-President since April 28th, 1928; on becoming Chancellor of the University of the State of New York, and, as such, the head of the educational system of that State, deemed it necessary to resign as a member of the Council and Vice-President of the Institute. At the meeting of the Council held January 30th—February 2nd, 1935, his resignation was accepted with great regret. The vacancy thereby created in the Council was filled by the election of Mr. Cornelius W. Wickersham, of New York, and the Honorable Learned Hand, a member of the Council, was elected to succeed Mr. Byrne as Vice-President.

At the same meeting of the Council, the resignation of the Honorable Newton D. Baker, a member of the Council since May 6th, 1931, was presented, and accepted with great regret. This vacancy is to be filled at the present meeting of the Institute, as is also the vacancy which was temporarily filled by the election of Mr. Cornelius W. Wickersham.

The outstanding accomplishment of the past year has been the publication of two volumes of Torts and one of Conflict of Laws. We now have in the hands of the profession seven volumes of the completed Restatements, as well as the Study of the Business of the Federal Courts, which was begun by the National Commission on Law Observance and Enforcement, and the Model Code of Criminal Procedure. The completion and publication of the remaining ten volumes of Restatements, between now and the end of the year 1939, is well assured.

The Council has debated, but without reaching a conclusion, whether or not to undertake the Restatement of the subject of "Security," or that of "Cooperative Effort," to finance one of which the Carnegie Corporation has appropriated $100,000.

The Adviser on Public Relations will report to you the progress that is being made in the different States in preparing annotations to the various Restatements. There appears to be an insistent demand for these annotations, which will furnish the practitioner with reference to the principal authorities in his own State bearing upon the propositions in the Restatements. The subject of explanatory notes or commentaries also is constantly being pressed upon the attention of the Institute. It is hardly necessary to rehearse the considerations respecting this subject which we have debated, at the meetings of the Institute and in the Council. While at first we did contemplate the preparation of treatises to accompany the Restatements, this was found to be wholly inconsistent with the production, within a reasonable period of time, of a "definite, coherent and essential part of an ideal restatement of the common law." The prime object which we had in mind at the beginning of our work, was, so far as practicable, to remove the two chief defects in American law, reported by the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, namely, its uncertainty and its complexity. One of the recognized causes of this uncertainty was lack of agreement upon the fundamental principles of the common law. This we sought to remove by formulating such succinct statements of those prin-

ciples, as would represent the agreed views of representative members of the Bench and Bar and of the law-teaching profession.

At the opening meeting of the Institute, Mr. Root stated that the work undertaken was designed to relieve the practicing lawyer from the burden of going back through ten thousand cases, by giving him the statements of the principles of law, which would have been formulated for him, and which he could accept as practical *prima facie* statements, upon which, unless they should be overthrown, judgment might rest; the burden to overthrow the Restatements being upon any lawyer whose interest in litigation should require him to contend for a different view of the law. Sir John Salmond, in his work on Jurisprudence, points out that the first use of the law is

"that it imparts uniformity and certainty to the administration of justice. It is vitally important," he says, "not only that judicial decisions should be correct, distinguishing accurately between right and wrong, and appointing fitting remedies for injustice, but also that the subjects of the States should be able to know beforehand the decision to which on any matter the courts of justice will come. This prevision is impossible unless the course of justice is uniform, and the only effectual method of procuring uniformity is the observance of those fixed principles which constitute the law."[1]

It has been the effort of the scholars and the practitioners who have united in the preparation of the Restatements, to furnish the practicing lawyer with a clear, intelligible and accurate statement of the fundamental principles, which are supported by the weight of authority, and which he can assume to be the present state of law: what Salmond calls "those fixed principles which constitute the law." But the force of habit of the American legal mind is such that, confronted with statements of the existing law, even if the product of the best scholarship of the day, he still desires to go back through the welter of cases, and put himself in the position of those who have produced these formulations of the law, and revise or verify the accuracy of their conclusions.

The Restatements are products of group work. They represent, not merely the conclusion of one mind, but the agreement of many. To write a Commentary or Treatise which would represent such concurrence is quite impracticable. That must be the work of one, or, at most, two persons. Such Commentaries or Treatises are already being produced by individual effort. Williston on Contracts and Mechem on Agency were published before the Restatements were formulated. Professor Beale has just published a treatise on Conflict of Laws which is expressly recommended to the profession as "a complete commentary on the Restatement of Conflict of Laws." It is understood that Messrs. Seavey and Bohlen intend to publish books on Agency and Torts, respectively, when their work on Restatements is finished, and Mr. Powell has prepared explanatory notes on Property, as the work of restating that subject has progressed, which, I am informed, he contemplates publishing when the Restatement is completed. Thus the desire of the Bar for reference to and discussion of decisions will be gratified, although the Institute will not, in any way, be responsible for such treatises.

The Second Edition of a pamphlet on "The Restatement in the Courts" recently has been issued (February, 1935), giving references to the citations of decisions by courts in which the Restatements are used, which fill upwards of 250 printed octavo pages. This resumé shows a gratifying increase in the use of the Restatements by the courts, not merely in their final form, but also of the tentative drafts. In a very recent case, the Supreme Court of California overruled a previous line of its decisions on a point in the law of Agency, saying:

". . . this subject has had thorough consideration by law collaborators, as shown by the recent product of the American Law Institute, styled 'Restatement of the Law—Agency,' where the rule suggested is as follows:" quoting Sections 259 and 260 thereof, and adopting as law the rule stated therein.

This whole matter was discussed at length at a recent meeting of the Council. One of its members said that the judges are unwilling to accept the Restatements unless satisfied that they are supported by the cases. Another member said that a good many lawyers started with the theory that the Restatements would be a sort of glorified cyclopedia of law, and that many lawyers and judges still think that, and are disappointed because we do not provide them with citations to support each section.

The Council adopted the following resolution:

"RESOLVED, That the Council is sensible of the existence of a demand on the part of the bench and bar for some matters supplemental to the Restatements in their present form and that the Council, instead of deciding that that demand shall now be complied with, definitely decides that the existence of the demand and the best way to satisfy it shall be kept constantly before the Council as a matter of urgent consideration and to that end requests the Director and the Executive Committee to report hereafter upon further deliberation what practical ways can be suggested for satisfying the policy thus declared and meeting the needs of those who have expressed their desires."

It would aid the Committee if members having any definite views on this subject would communicate their suggestions to the Director.

A comparatively new subject, to be brought before the Institute at this meeting, arises on the report of the Advisory Committee on Criminal Justice, which has recommended that the Institute undertake a work of very considerable magnitude in a field which we have occupied in part in the preparation of the Code of Criminal Procedure, and in part in the proposed Statutes on Double Jeopardy, Summoning Witnesses fromOther States, and the Use of Force in Making an Arrest.

The President of the United States, in a letter addressed to the Institute on the occasion of its annual meeting in May of last year, said:

"I need not point out to you that the adaptation of our criminal law and its administration to meet the needs of a modern complex civilization is one of our major problems. I believe the American Law Institute is in a position to make important contributions to the solution of this perplexing problem."

The Joint Committee, composed of representatives of the American Bar Association, the Association of American Law Schools, and the American Law Institute, recommended that the Institute undertake, in the field of criminal justice, a restatement of the common law crimes and a code of criminal law. The Executive Committee of the Institute provided by resolution for the appointment of an Advisory Committee on this subject, to examine the report of the Joint Committee and the report of

1. Salmond, Jurisprudence, 6th Ed. 1920, pp. 19-20.

the Director of the Institute, and to make thereafter to the Executive Committee or to the Council, definite recommendations respecting the part, if any, which the American Law Institute should take in the projected work in the field of criminal justice.

This report has been made, and will be presented to this meeting for its consideration. The project recommended is of wide scope and presents many interesting lines of effort. It is unnecessary to rehearse the provisions of the report, but it outlines work, which, if undertaken, will require a number of years of continued effort, and whether or not it can be undertaken will depend entirely upon the possibility of financing such an extensive undertaking.

In this connection also, the Executive Committee has presented to the Council a report, which also will be submitted for your consideration, regarding the future of the Institute. As the work of restating the fundamental topics of the common law approaches completion, the officers of the Institute have felt that it was wise to look over the entire field contemplated by the charter of the Institute, which is very broad in its expression, and embraces, not only the clarification and simplification of the law and its better adaptation to social needs, but broadly, to secure the better administration of justice, and to encourage and to carry on scholarly and scientific work.

The success which we have had up to the present time, in bringing into active cooperation, not only the judges and lawyers of the country, but also the teachers of the law and the scholars who are devoting their lives to its study, has convinced the officers and the members of the Council that we should not cease our efforts, so long as in the whole field of law and its administration there are problems and conditions which call for improvement.

I will not attempt to anticipate the outline of the possible future work of the Institute, nor the importance of some of the recommendations which you will find in the report to be submitted to you, but merely will call attention to the fact that we have thus far occupied but a small part of the field which we believe we are equipped to consider, and in which we feel we can do a work useful to the profession and to the public.

One of the subjects not referred to in the report might also be given careful consideration by the Institute, and that is, the conditions growing out of the recent and unprecedented increase of bureaucracy in our government, and the resulting enormous spawning of regulations entering into an infinite number of details of our national life, and imposing restrictions, obligations and duties, many of which are enforcible by criminal penalties. Regulations of such nature seem to be characteristic of triumphant bureaucracy everywhere. Some suggestion of the evils arising out of such a system were recapitulated by Lord Hewart, in his book, "The New Despotism," and by the Honorable James M. Beck, in his work, "Our Wonderland of Bureaucracy."

In contemplating this mass of regulation of the affairs of men, under a government which was long applauded as one of laws and not of men, and reflecting upon the difficulty of finding what many of them are and where they may be found, one is reminded of the activities of the Emperor Caligula, referred to in Blackstone's Commentaries, who wrote his laws in small letters, and placed them at the top of high columns, the better to ensnare his subjects.

Much of this mass of bureaucratic regulation is so new that perhaps the time is not ripe for scholarly investigation and consideration. Yet, on the one hand, if taken in its infancy, a harmful growth may be prevented, and our people saved from the consequences of the unrestrained and unscientific method of delegated legislative activities. On the other hand, it may be that the recommendation which has been made that the Institute undertake a study of the Rules of Evidence, in order to improve and simplify these important adjuncts to the practice of the law, should first be undertaken.

I merely refer to these fields of possible usefulness to indicate that there will be ample opportunity for the services of an organization such as this for some years to come. If by by the nature of the work that we have done and a general recognition of the sound scholarship which characterizes it, we shall have secured the confidence and support of the profession and of the thoughtful part of the laity, there is no reason to think that our work may not be continued with constant usefulness for years to come.

Meeting of National Association of Women Lawyers

The thirty-sixth annual meeting of the National Association of Women Lawyers will be held in Los Angeles on July 15 and 16. Headquarters will be in the Clark Hotel.

The opening session will be devoted to committee reports. Among the chief reports will be the ones on Legal Education which will be given by Tella Haines of Indiana, and on International Relations which will be presented by Dr. Emma Wold of Washington, D. C. The divorce problem will occupy the attention of delegates at the Monday afternoon meeting. Felice Cohn of Nevada, Rita Callaway of Arkansas, and Florence Harmon Dock of Guadalajara, Mexico, will lead the discussion. That evening a reception and buffet supper will be held in honor of women judges at the home of Percilla Randolph in Santa Monica. Following the reception, the convention will reconvene that evening to hear special reports and to make nominations.

Tuesday morning the women lawyers will gather in the headquarters hotel at a breakfast in honor of their national officers. The remainder of the morning will be devoted to committee reports and to election of officers. They will adjourn that afternoon to the Philharmonic Auditorium to hear the address of President Scott M. Loftin. The convention will conclude with a banquet Tuesday evening in the Biltmore Hotel. Among the featured speakers of the evening are: Judges Florence E. Allen, Genevieve Cline, Georgia Bullock, Camille Kelley, Jeanette Brill, Ida May Adams, Mary O'Toole, Florence Etheridge, Oda Faulconer, Helen Hulbert, and Theresa Meikel. While in Los Angeles the women lawyers will be taken on several tours by the Los Angeles Bar Association.

THE MEMORY OF MARSHALL

The Sublime Task of John Marshall Was to Give to the Constitutional Grants of Power a Reasonably Liberal Construction that the Constitution Itself Might Survive—But in These Extensions of Federal Power He Always Prescribed Limitations—Marshall and Jefferson Were the Positive and Negative Poles of the Republic's Formative Period—Criticism of the Supreme Court in His Time Partly Due to an Initial Error on His Part—A Great Jurist but an Even Greater Statesman.*

By Hon. James M. Beck

Chairman of American Citizenship Committee, American Bar Association

WE are met today, my fellow citizens, to honor the memory of a very great man. One hundred years ago in a small boarding house at Fifth and Walnut Streets, Philadelphia, an old man, as full of years as honors, was slowly dying. Years before he had experienced that compensation of long life, of which Prince Bismarck once said that "one of the advantages of becoming old is that one becomes indifferent to hatred, insult and calumny, while one's capacity for good will and love is increased." It did not need the winter of age to give John Marshall this serenity of mind, for throughout his long and illustrious career he had always felt that conscious integrity of purpose, which made him indifferent to either the censure or praise of his fellowmen.

His mind was clear in those last days, and we can well believe that with mental vigor unimpaired to the very last, he spent the weary days of his last illness in thinking of the past. It is probable that his mind dwelt but little upon his last thirty-five years, in which he had been the storm center of passionate strife, for the memories of old men generally recur to the events of earlier years. That which met his eye as he looked out of the window of his Walnut Street room would, in itself, tend to recall the heroic memories of the epic period of America.

Across Independence Square he could see the belfry of the State House, now called Independence Hall, from which, as from Pharos, the light of liberty had shone to the uttermost parts of the world. From hour to hour he would hear the solemn sounds of the bell in the tower, a bell already sacred to America for from the very moment of its casting in 1752, it had been a sonorous prophecy of America's destiny. The bell had been cast in England, but the City Fathers of Philadelphia had requested the makers to put upon the bell the historic message "Proclaim liberty throughout the land and unto all the inhabitants thereof." Nobly it had fulfilled that mission, for the bell had announced the coming of the first and second Continental Congress. It had sent forth a paean of triumph, when the Declaration of Independence was first read to the people. As post riders brought the sad intelligence of the early defeats of Washington's untrained army, the bell would mourn the dead, who had fallen in battle, and later sound a note of triumph when the news of Washington's victories at Monmouth and Yorktown came to the historic capital. The men of the Constitutional Convention during their deliberations of nearly four months could hear its solemn notes as they recorded the passage of the hours.

As the dying Marshall witnessed the sun setting in the direction of Valley Forge, he must have thought of that dreadful winter, in whose privations he had shared, when the few soldiers who remained in Washington's army stained the new-fallen snow with the blood of their naked feet. Marshall must have thought, in those last days, of the great leader, who had held together the little remnant of the Continental Army at Valley Forge, and whose heroic courage had left so deep an impression upon Marshall's character.

We cannot doubt that Marshall's mind in those last days went back to his well loved Virginia, the mother of superlatively great sons, where he desired his remains to rest forever. He was the child of its frontier. His education had been very limited. He had lived close to the heart of nature and its simplicity had formed his character. Denied the privilege of dying in the State which had given him birth, yet Marshall in Philadelphia was not among strangers. Much of his life had been spent in Philadelphia, and there he was held in the highest honor. He had fought beyond its gates at Germantown and Brandywine, had seen the sun, which set at Valley Forge, rise resplendent on the wooded slopes of Monmouth. Later he had served as a member of its first Congress, when the historic city was the capital of the nation. From Philadelphia he had gone to France, and had met the corrupt demands of its government by vindicating the dignity of the infant Republic in the policy of "millions for defense but not one cent for tribute." In Philadelphia he had been received with general acclaim on his return from France. No two cities can have a greater claim to the enduring reputation of John Marshall than Richmond and Philadelphia, and this circumstance may give some propriety to my selection as the speaker of this occasion, for I am a Philadelphian and am proud of my membership in its historic bar, which honored him when he died, accompanied his remains to Richmond and initiated the movement for the erection of a statue in Washington to commemorate his services. A commission was given to William Wetmore Story, an eminent sculptor, who by a happy coincidence was the son of Justice Story, John Marshall's great yoke fellow on the Bench. It was my privilege in turn, to present to the city of Philadelphia a replica

*Address delivered at the Memorial Exercises Commemorating the Hundredth Anniversary of the Death of Chief Justice Marshall, at Richmond, Va., May 11, 1935.

of that statue. I mention the fact because one other replica of that statue should be made and presented by the Congress of the United States to the city of Richmond.

In Philadelphia John Marshall died, and two days later, with all the pomp and ceremony that truly attends the passing of a hero, his body was borne from his temporary home to Richmond.

> "For his passage
> The soldiers' music and the rites of war
> Spoke loudly for him."

Then followed an incident of epic beauty. The historic Liberty Bell tolled the passage of the body to Market Street Wharf, and having rendered this last and sacred service, suddenly became silent forever. A great rift took place in its iron side, and thenceforth the bell became our most sacred symbol of liberty. Its service to liberty ended with that of Marshall.

Those last solemn notes marked not only the passing of Marshall but also the end of a great and heroic era. While a few of the great actors in the drama of American Independence still survived, for example Charles Carroll of Carrollton and James Madison, yet with the passing of Marshall, an era ended which had begun with the founding, in 1607, of representative government in Virginia. Thus the death of Marshall measured a period of 228 years, during which the American Commonwealth had been molded by successive generations of Americans, in the free spirit of the pioneer. This period of national building had its climax when the ablest men of the Colonies met in Philadelphia to attempt the unprecedented task of drafting a comprehensive form of government of a type heretofore unknown in history. It was not enough for the master architects to provide the ground plan for the majestic edifice of constitutional liberty which the genius of the American people was to erect. It was John Marshall's task to supervise the erection of the superstructure in accordance with the plans of the master builders, and when he had completed this task by his masterful interpretations of the Constitution in his service of thirty-four years as Chief Justice of the United States, the task of constructing "an indissoluble union of indestructible states" had been completed. Of that era it may be said that few nobler dramas have ever been enacted "upon the stage of this wide and universal theatre of man."

Who can deny the great role that was enacted in that drama by the sons of Virginia. Let us remember that the Elizabethan era was the climax to that mighty cultural movement that is known as the Renaissance, and Virginia was the last, but not the least development of that epoch. I have said elsewhere and now repeat that it is an unfortunate error to regard the birthday of our nation as July 4th. The American Commonwealth began with the first settlement in Virginia, and was thus born of the spacious days of Queen Elizabeth. Its early sons were contemporaries of Marlowe and Shakespeare, of Coke and Bacon, of Sydney and Jonson, of Drake and Frobisher, of Raleigh and Sandys, of Pembroke and Southampton. Small as Virginia was, and limited as were its cultural resources, what infant Commonwealth in a like period of time, and in the field of government, ever gave birth to greater men than Thomas Jefferson and Patrick Henry, John Marshall and James Madison, James Monroe and Edmund Randolph, George Mason and Richard Henry Lee, and last and greatest, that sturdy son whose reputation overtops all Americans, and who is one of the supreme immortals of history, George Washington. Four of this galaxy of the immortals became Presidents of the United States. While any prediction as to the illimitable future is generally hazardous, it is probable to the verge of certainty that in the field of leadership no American will ever surpass George Washington, and that in the field of law no Judge will ever rival the fame of John Marshall.

Let us consider briefly and necessarily inadequately the significance of John Marshall's work. It is given to few men to rise so high above the clouds of controversy that in a later time only praise is spoken of him. As in the case of Washington, Marshall is so supremely great in his chosen field of activity that all balanced criticism becomes difficult. But if he could guide us in our deliberations today, his love of truth would say with Othello

> "Speak of me as I am, nothing extenuate
> Nor set down aught in malice."

All Americans today praise Marshall, and this blinds us to the fact that it was not so when he was among the living. Today men think of him as having, in his tenure of office, sat in serene and unclouded skies as upon some mountain peak, below whose summit were the clouds of passionate strife which touched him not. The fact is that from the beginning of his work as Chief Justice to the very end, he was the storm center of as bitter and passionate a political struggle as ever enveloped any judge. Almost his first judicial act provoked a storm of bitter criticism, which raged throughout the whole period of his service, and thirty-four years later his last days upon the Bench witnessed a humiliation when Georgia refused to appear at the Bar of his Court in obedience to its summons, and subsequently refused to comply with a decree which the Court had entered. Nor was Georgia, in this recalcitrance, without sympathy in high places, for the then President of the United States, Andrew Jackson, sarcastically said, "John Marshall has entered his decree. Now let him enforce it." The decree was never enforced, and at the time the prestige of the Supreme Court seemed to be so fatally shattered that John Marshall not only felt that its moral authority was gone, but that the existence of the Union itself was in peril.

Writing in 1832 to Story, who then doubted the perpetuity of the Constitution, Marshall said,

> "If the prospects of our country inspire you with gloom, how do you think a man must be affected who partakes of all your opinions and whose geographical position enables him to see a great deal that is concealed from you? I yield slowly and reluctantly to the conviction that our Constitution cannot last. Our opinions are incompatible with a united government, even among ourselves. The Union has been preserved thus far by miracles. I fear they cannot continue."

These words may be profitably recalled by those Americans, of whom I unhappily, am one, who today share the same doubts, for the Constitution did survive. While this is largely due to Marshall, yet it also owes much to Andrew Jackson.

No Chief Justice of the United States has ever been assailed as bitterly as was John Marshall, and yet when he died friend and foe, almost without exception, united in a tribute of praise to a courageous and incorruptible judge. Throughout all these stormy years, John Marshall serenely pursued

the even tenor of his ways. He had able associates and yet he was the very soul of the Court. He rendered decision after decision which gravely challenged the constitutional theories of the great political party which was then almost continuously in power. I know no finer illustration of the noble lines of the poet, Horace, when he describes so eloquently the just man, and concludes

> "The man, in conscious virtue bold
> Who dares his secret purpose hold
> Unshaken hears the crowd's tumultuous cries
> And the impetuous tyrant's angry brow defies;
>
> Let the loud winds, that rule the seas
> Tempestuous their wild horrors raise
> Let Jove's dread arm with thunder rend the spheres
> Beneath the crash of worlds undaunted he appears."

It is a mistake to suppose that Marshall's opponents were in all respects wrong, and the truth of history justifies the statement that the attacks upon the Supreme Court in Marshall's time were partly attributable to an initial error on Marshall's part. This is so rarely recognized that it justifies an explanation.

Before Marshall became Chief Justice he was the Secretary of State in the Administration of John Adams. That Administration had been signally repudiated by the American people. The dying Federalist Party, in which the influence of John Marshall was dominant, resorted to the expedient which does not admit of justification, of creating a large number of federal judges with a life tenure, and in the last days of the Adams administration filling them with avowed Federalists to intrench that party in one branch of the government. Undoubtedly the Federalists sincerely but mistakenly believed that the party of Thomas Jefferson intended to destroy the Constitution, and with high but mistaken motives it determined to construct for the Constitution a line of impregnable defense in the judiciary. From the calmer standpoint of a later age, we can now see that such an action, whatever its motive, did not accord with the spirit of a democracy. If the Adams administration had simply created the federal judgeships, and then allowed the administration, which the people had chosen and which was then coming into power, to select the incumbents of the offices thus created, there could have been no criticism.

This coup d'état—and it was scarcely less—had resulted in acute irritation between the incoming and the outgoing administration. It involved Marshall, who, as Secretary of State, had signed the commissions of the "midnight judges." Hardly had he taken his seat as Chief Justice when a phase of this bitter controversy came before his Court in the famous case of Marbury v. Madison, and in its opinion the Supreme Court, after deciding that Marbury was entitled to the office, although his commission had not been delivered to him, then proceeded to hold that it was without jurisdiction in that proceeding thus to adjudge the merits of the controversy. The resentment of Jefferson and his followers at this decision was not due to the fact that the Supreme Court thus firmly established its power to disregard a statute, if inconsistent with the Constitution, but was largely animated by the fact that the Court passed upon the merits of the case while it admitted it had no jurisdiction and thus gave its high sanction to the policy of the Adams administration in creating, in its closing days, a number of federal judgeships, and then hastily filling them with appointees of the Federalist Party.

The Party of Jefferson was not without some justification in its bitter attacks upon this political coup d'état, and while the decision of the constitutional question probably saved the Constitution, yet it was unfortunate in that for a time it compromised the reputation of the Court as a nonpartisan body. Never again did Marshall commit a like error, and its only justification lies in his honest purpose to preserve the Constitution against the excesses of democracy, of which he honestly believed the new administration would be guilty. His fears in this respect were as groundless as were the fears of his political opponents that the federal judiciary would obstruct the will of the people.

Time, the great Justicer, will give a just judgment as to the merits of Jefferson and Marshall and if its final verdict can be anticipated, it will be that neither was wholly right nor wholly wrong. They were the positive and the negative poles of the Republic's formative period, and these counteracting influences are as necessary in the realm of government as in that of physics. In our political judgments we should always remember the conciliatory words of President Jefferson, in his first inauguration,

> "Every difference of opinion is not a difference of principle. We are all Republicans; we are all Federalists."

In this memorable duel between Marshall and Jefferson, great allowance must be made for both protagonists, for this was the formative period of the Republic, and until the new edifice had firmly settled upon its foundations, it was inevitable that there would be acute differences of opinion, as novel questions arose, which would betray both parties to the controversy into temporary errors. Let us not forget that the Constitution of the United States was a great and an unprecedented experiment, and that the collision of antagonistic theories was inevitable. Indeed the amazing success of the American Constitution is due to the fact that there was this conflict of views, which lessened the danger of extremes in any direction.

In the field of government, as in mechanics, there is always a centripetal and a centrifugal tendency. The real problem, both of mechanics and government, is to coordinate them. It is the greatest merit of the American Constitution that above every other political frame of government, it did coordinate the two tendencies. The real question in the minds of the Founders was whether the American people would have sufficient genius for government to carry out the theory. This gave rise to two schools of thought.

On the one hand Patrick Henry, Thomas Jefferson and later James Madison believed that in the practical working of the government the centripetal tendency would be so powerful that sooner or later the central government would absorb the states. We commonly think of Patrick Henry as only an orator, but his masterful argument in the Virginia ratifying convention clearly foresaw the centralization of today, and his fears were emphasized by Jefferson and Madison.

On the other hand, Washington and Hamilton were fearful that the centrifugal tendency in proud and self-conscious states would be so great that sooner or later the central government would disintegrate and become as impotent as the old Con-

federation. In their own day their fears were justified.

The distinguishing merit of John Marshall as Chief Justice was that he, more than any other American, coordinated these conflicting tendencies. If he asserted, in one opinion, the authority of the central government, he asserted, with equal force, the rights of the states.

The fears of Washington and Hamilton were justified when the centrifugal tendencies resulted in the Civil War, but the tragic consequence of that fratricidal conflict was that in defeating the centrifugal tendencies, it gave such an impetus to the centripetal tendencies that today the fears of Henry, Jefferson and Madison are fully justified.

Today there is no centrifugal tendency to coordinate the centripetal tendency due in large part to a mechanical civilization. The two historic parties vie with each other in centralizing the government, with the result that the centripetal tendency is now fast destroying the centrifugal, and we have today in fact, although not in theory, a fateful approach to a totalitarian socialistic state.

The achievements of any man or party must be measured by the immediate necessities of the times. In Marshall's day, the mind of America had not yet been either adapted to or reconciled with the idea of a central government. It required the deliberation of nearly four months to induce the Constitutional Convention to create a central government which, within its carefully prescribed sphere, would be a nation and not a league of states. The Convention was so largely a compromise that on its last day few members were disposed to sign, as individuals, the draft of the Constitution which was to be submitted to the people. The process of ratification required over a year, and the requisite consent of the nine states was secured with the very greatest difficulty, and in some states only by dubious methods. The people were still jealous, as they had always been, of any central power, and when the Constitution was finally adopted it became a vital necessity, if it were to survive, that the Supreme Court should give to the grants of power a reasonably liberal construction.

This was the sublime task of John Marshall. Largely due to his influence, the Supreme Court, in a long series of pioneer decisions, welded together the discordant states into the "indissoluble union of indestructible states." To do this required something more than a knowledge of the law. It required statesmanship of the highest order, and above all it required the prestige of an incorruptible and impartial judiciary. While Marshall's first great decision had temporarily compromised this reputation, yet his calm reasoning, his well balanced judgment, and the acknowledged rectitude of his character soon overcame the temporary prejudice, and by sheer force of reasoning Marshall finally triumphed, but in acknowledging this triumph a later generation should recognize that Marshall's opponents were also justified in their apprehension that the words of the Constitution, if too liberally construed, could be destructive of the rights of the states, and upon the other hand, the service of Marshall and his associates had an equal justification in the fact that if the Constitution was not to degenerate into an impotent confederation, his interpretation of its provisions, as adapted to a growing and progressive people, were vitally necessary to the success of the great adventure.

Each party to this great controversy over constitutional rights rendered a service to the country. The fears which Patrick Henry, Thomas Jefferson and James Madison had in respect to the undue development of federal power have had their fullest vindication in the realities of the last fifty years, and Marshall's great decisions, now so universally applauded, owed much, not merely to the arguments of Webster and Wirt, Pinckney and Binney, but also to the watchful vigilance of Jefferson and Madison, who, by criticism and opposition, prevented, in their day, an excessive development of federal power. I rejoice that the spirit of these two Virginians is today animating the two Senators from Virginia, who are old fashioned enough to believe in the reserved rights of the states.

Marshall was the great advocate of the doctrine, subsequently emphasized by Webster that the United States was created by the people of the United States and not by the states in their then sovereign capacity. He based this upon the language of the Preamble, which says that "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."

In considering his reasoning it must always be remembered that he did not have the advantage that we have of Madison's Debates, for there the peculiar reason for this language was fully explained. That this Republic was created by the States in their corporate capacity does not seem to me to admit of doubt. But while this may have been a false premise to some of his reasoning, yet it was Marshall who said, in McCulloch v. Maryland,

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the states and of compounding the American people into one common mass. Of consequence when they act, they act in their states but the measures they adopt do not on that account cease to be the measures of the people themselves or become the measures of the state governments."

Here again was an excusable historical error, for if he had been privileged to read Madison's debates in the Constitutional Convention, he would have seen that Alexander Hamilton did propose that the states should be extinguished," although Hamilton recognized that public opinion was not ready for such consolidation. It must be added that if Marshall were alive today, he would find that in the matter of trade and industry there are not only "political dreamers," confused by the nightmare of the present economic depression, but even responsible statesmen who would break down "the lines which separate the states" and "compound the American people into one common mass."

If John Marshall was a great jurist, he was an even greater statesman. The essence of a statesman is to have that vision without which it is said, on ancient authority, that a people will perish. Marshall wrote nearly all of his opinions in the last period of the pastoral-agricultural life of mankind. The steamship was then beginning to pass as a shuttle between the nations, but the railroad was only in its infancy, and then gave little assurance of its dominating influence in civilization. Under these circumstances the Chief Justice might have given a narrow definition to that interstate com-

merce which Congress was empowered to regulate. In his wonderful opinion in Gibbons v. Ogden, possibly the greatest of his decisions, Marshall saw the future of our civilization as few men of his generation. He gave to the term "commerce" a definition which "time cannot wither nor custom stale." He seemed to see the future as from a mountain peak. Unhappily his definition of commerce has, in later years, been perverted to impair the rights of the states, but it still stands, for only last Monday the Supreme Court, in the Railroad Retirement Case, took occasion to emphasize the doctrine of Marshall in the following words:

> "The Federal Government is one of enumerated powers; those not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states or to the people."

The present generation seems to have forgotten this fundamental doctrine, and no one would be more amazed than John Marshall, if he were here today, at some interpretations by the Congress of its power over interstate commerce, which have asserted a right to control within the states even the minutiæ of production. This great decision is a visible reminder that the Constitution is like some Alpine peak—it may be obscured for a time, by the clouds, but it still stands upon its foundation of eternal granite.

The strength of the judiciary has been and will ever be in its continuing power. Presidents come and go, parties organize and dissolve, social and economic conditions change, but the Supreme Court remains a constant factor. As I venture to say in my book, "The Constitution of the United States":

> "Like the ocean, the political life of the American Republic is at times placid, with hardly a ripple upon its surface, and then the furious storms of discontent lash the waters into violent and angry seas. But always the Supreme Court stands as a great lighthouse, and even when the waves beat upon it with terrific violence (as in the Civil War, when it was shaken to its very foundation), yet after they have spent their fury, the great lamp of the Constitution—as that of another Pharos illumines the troubled surface of the waters with the benignant rays of those immutable principles of liberty and justice, which alone can make a nation free as well as strong."

No institution of our government has better survived the ordeal of democratic government. None has awakened more the curiosity and admiration of enlightened publicists of all nations. When I was invited to address the Bench and Bar of France, in the Cour de Cassation (the highest Court of France) and I asked upon what feature of the Constitution they wished me to speak, the prompt answer was "The Supreme Court of the United States," and when my book on the Constitution was translated into German, the Chief Justice of the German Republic, who wrote the introduction to the German edition, recorded as his deliberate conviction that the Weimar Constitution of the German Republic would not endure unless the Supreme Court of Germany were given the same power in preserving the Constitution that the Supreme Court of the United States enjoys. This produced a storm of controversy between German jurists, some preferring the English plan of the omnipotence of Parliament, and others endorsing the view of Chief Justice Simon as to the advantage of the United States Constitution in making the Supreme Court the great arbiter and political conscience of the nation in matters of constitutionality. Unfortunately the Weimar Constitution, otherwise an admirable document, made no such provision for the German Republic and it perished when Hitler destroyed both the legislative and the judicial power.

While the construction of the Constitution was not, in some respects, difficult, in view of the admirable clarity of its provisions, yet it was necessary to apply it to a country whose rapid growth is one of the wonders of history. Conflicting sectional interests must be reconciled, and the task of reconciling federal supremacy within its sphere with the reserved rights of the states and of the people was a task at once supremely difficult and unprecedented. It required the genius of a Marshall to do this in a manner that would be acceptable to a people, whose genius was that of democracy, and his supreme achievement is that he did so in a manner that is enduring. This does not mean that all his decisions have stood the test of time. To say that would be mere flattery of the dead. His great decision in the Dartmouth College Case was so extreme that it has required very substantial and necessary modifications in later times.

An examination of Marshall's decisions has impressed many that all his decisions were in the direction of an extension of federal power, and this is superficially true, but it must be remembered that to these extensions of power, Marshall also prescribed limitations. For example take the great case of Brown v. Maryland, where the Chief Justice held that no state can forbid the introduction from another state of a harmless commodity of commerce in its original package or the right to sell same. This was a considerable amplification of the commerce power, but the decision carried with it the necessary implication that before the commodity moved from state to state, the state was within its reserved rights in controlling its production, and that after the imported article had been merged into the current of domestic commerce by the sale of the original package, then the state had full power in respect to its future use or distribution. Thus Marshall recognized the rights both of the states and of the federal government, and the same can be said of many of his decisions, which, in applying the Constitution to the ever changing economic conditions of America, drew a line of demarcation between federal and state power.

The judicial spirit in which Marshall interpreted the Constitution was well stated by him in his conduct of the trial of Aaron Burr:

> "That this Court dares not usurp power is most true. That this Court dares not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom."

Certainly Marshall never hesitated between these dread alternatives. Whatever else may be said of his decisions, none was ever inspired by fear.

By common consent John Marshall is the great expounder of the Constitution, and in estimating his personal worth we must consider the nature of his qualifications. He was not a highly educated man. Like Franklin, a child of the frontier, he had had little scholastic education. He did become an active practitioner at the Virginia bar, but his experience as a lawyer could not have been great, measured by

the standards of today. His genius was rather that of common sense than of pedantic learning.

He recognized that a written Constitution, no matter how great its clarity, could not be effective for a great and growing people without the power of reasonable interpretation. Long before Justice Holmes said that "language is but the skin of thought," Marshall had said, in McCullough v. Maryland,

> "Such is the character of human language that no word conveys to the mind in all situations one single definite idea."

He therefore recognized that if the Constitution was "intended to endure for ages to come" it must "be adapted to the various crises of human affairs."

Those who would reason away the essential meaning of the Constitution by resort to Marshall's use of the word "adapted," and today there are many should realize that the whole tenor of Marshall's decisions clearly indicate that by the word "adapted" he meant applied. He was discussing the doctrine of implied powers, the existence of which he recognized as necessary if the Constitution were to be more, as he said, than "a splendid bauble." For all time he defined the justification of implied powers when he said,

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

I am quite conscious of the misuse of this famous definition, for it is now quoted to justify the idea that whatever the Congress may regard as for the "general welfare" is, for that reason, within "the letter and spirit of the Constitution," but such extremists forget that any implied power must, according to Marshall, "be within the scope of the Constitution," and surely nothing can be within such scope when it either invades the reserved rights of the states or of the people.

Marshall may have been fortunate in the fact that he acquired his knowledge from events rather than from books. Heretical as it may be, I sometimes wonder whether education does not confuse the mind as well as enlighten it. Certainly modern education tends to dissipate the human mind over too many subjects, most of which are unimportant. Great men have generally been men of simple ideas and those derived from the realities of life rather than from the theories of book men. Franklin, Washington, Marshall and Lincoln—possibly the four greatest intellectual leaders of the American people—all graduated in that best of schools, "the University of Realities." Neither as a scholar nor as a lawyer did John Marshall owe much to books, and this may account for his distinguishing quality of clarity.

It certainly accounts for his political philosophy. Unquestionably Marshall, like Washington, was a Federalist. Neither had ever philosophized on the subject of political government, but their military service had taught them, in the most realistic way, the evils of a mere league of states, where an impotent central government had merely influence, and as Washington tersely said, "Influence is not government."

The great achievement of Washington was not as a military strategist, but his ability to keep together the straggling units of an improvised army, over which he had no adequate authority. The militia of the states came and went, as they wished, and sometimes on the eve of battle. The sufferings of Valley Forge were not due to a depleted country but to an impotent Congress. The bitter sufferings of Washington's army, and the unnecessary prolongation of the war, deeply impressed upon both Washington and Marshall that while a central government should have a limited field of power, yet within that field its power should be plenary and authoritative. Unquestionably this conviction, born of bitter experience, profoundly influenced the decisions of John Marshall, whose dominant purpose was to weld the states into an efficient union through the Constitution.

We read his opinions as masterful oracles of the law, but while their reasoning is forceful, yet in the most important cases the questions were not difficult, and he had the advantage of construing the naked text of the Constitution. Madison's Debates had not then appeared, and little was known of the proceedings in the Constitutional Convention. Nor was he overwhelmed by a host of commentaries and by some thousands of opinions of the Supreme Court on constitutional questions, through which, as through overlying strata, lawyers today dig down to reach the foundations of the Constitution. The questions were of first impression, and such questions are much easier than those which have been confused by countless commentaries. Dr. Samuel Johnson once advised the student of Shakespeare to read the text of Shakespeare and disregard all that the commentators had said, and there was much force in the suggestion, and this may be true of the Constitution, for if we could tomorrow destroy all the judicial opinions as to its meaning that have appeared in 147 years of judicial controversy and take the naked text of the Constitution, and that alone, it is not unlikely that the Supreme Court today would reach the same conclusions that Marshall did when the questions were novel and unprecedented. This would be due to the permanence of Marshall's conceptions.

Marshall's amazing industry was such that of the 1,215 cases which the Court decided in his period of service, he wrote the opinions in 519, and he wrote more than one-half of all the opinions of the Court which involved the construction of the Constitution.

The great merit of Marshall's decisions is in their perfect harmony, like that of a Greek temple, and because they are expressed in such clear and limpid English that the man in the street could understand his conclusions, as well as the most learned lawyer.

Marshall's unquestioned triumph may not be due so much to his intellectual attainments, although they were great, but to the influence of his character. If he had been a corrupt, designing or even an ambitious judge, who was seeking either popularity on the one hand or political power on the other, his decisions would not have had the same weight, but the years of his long service marked a steady progress in the faith of the American people, without respect to party, in the absolute integrity of his mind. Men of his day might disagree with John Marshall, but they soon learned that his motives were beyond reproach. In his right hand he carried

> "gentle peace to silence envious tongues."

Never in judicial history has there been a greater

triumph of rectitude of purpose and action, and this again explains why, after thirty-five years of bitter controversy, when political passions ran far higher than they do today, the American people believed in John Marshall and accepted his interpretations of the Constitution because of their faith in his spirit of essential justice.

What remains to be said? In his last illness Marshall knew that the end was near, and with a life void of reproach and with a conscious pride that he had been privileged to serve, not only his day and generation, but the illimitable future of America, he met his end, not merely with the courage of a stoic, but with the faith of a Christian. It was the end which Bunyan so beautifully describes of Mr. Valiant-for-Truth, and I cannot more fittingly conclude this inadequate tribute to Marshall's memory than to quote Bunyan's simple but noble narrative of the passing of his hero:

> "He called for his friends and told them of it. Then said he: 'I am going to my Father's, and though with great difficulty I have got hither, yet now I do not repent me of all the trouble I have been at to arrive where I am. My sword I give to him that shall succeed me in my pilgrimage. My marks and scars I carry with me to be a witness for me that I have fought His battles, Who will now be my rewarder.' . . . So he passed over, and all the trumpets sounded for him on the other side."

The trumpet of fame will sound the praise of Marshall as long as the Republic endures.

A CALIFORNIA DRAMA

Turbulent Days of Fifty Years Ago in Golden State Recalled in Account of Killing of Former Chief Justice David S. Terry of the Supreme Court of California by Deputy United States Marshal Neagle in Defense of Justice Stephen Johnson Field of the Supreme Court of the United States— The Famous Sharon-Hill Litigation

By Edmund W. Pugh

Member California Bar; Vice President and Secretary Security-First National Bank, Los Angeles

THE use of pioneer methods in settling legal controversies definitely came to an end in California on August 14, 1889, the day on which David S. Terry, who, thirty years previously, had been Chief Justice of the Supreme Court of California, was shot and killed in the dining room of the Southern Pacific Railroad Company at Lathrop, in central California, by David Neagle, a Deputy United States Marshal, who had been assigned by order of the Attorney General of the United States to protect Justice Stephen Johnson Field of the Supreme Court of the United States from anticipated violence on the part of Terry against Field. The killing of Terry was the high point in a thrilling drama which began six years previously and ended three years later. The official record is contained in the reports of no less than fourteen cases in the Supreme Court of California, the United States Circuit Court in California, and the United States Supreme Court.[1]

The principal characters in the drama were:

Stephen Johnson Field, Justice of the Supreme Court of the United States;

William Sharon, former United States Senator from Nevada;

David S. Terry, former Chief Justice of the Supreme Court of the State of California;

Sarah Althea Hill, later the wife of Judge Terry;

David Neagle, a Deputy United States Marshal.

Justice Field was born in 1816. He practiced law in New York until 1849, when he moved to California. In 1850 he was a member of the first California legislature. In 1857 he was elected to the California Supreme Court and in 1859 became Chief Justice. In 1863 he was appointed to the Supreme Court of the United States by President Lincoln. He was the brother of David Dudley Field, who worked forty years to bring about the codification of common law procedure in the United States. Justice Field retired from the United States Supreme Court in 1897 and died in 1899.

William Sharon was Senator from Nevada from 1875 to 1881. He was born in Missouri in 1821 and moved to California in 1849. He moved to Virginia City, Nevada in 1864, where he was manager of a bank. He became largely interested in silver mining and amassed a fortune. He died on November 13, 1885, in San Francisco.

David S. Terry was born in Kentucky in 1823. He came to California in 1849, after serving in the Mexican War, and practiced law at Stockton until 1855, when he was elected to the Supreme Court of the State of California. He resigned from the bench in 1859 to challenge Senator David C. Broderick to a duel, in which the latter was killed. He entered the Confederate service during the Civil War, and sometime after its close he returned to California and again entered upon the practice of law. He married Sarah Althea Hill after William Sharon died, and became her attorney in the subsequent litigation.

Sarah Althea Hill was a comely young woman who had come to California from Missouri. That she had a violent temper is shown by the record of the court proceedings in which she became enmeshed.

David Neagle was a courageous young man who knew how to handle a gun.

The Drama Begins

The drama formally opened on October 3, 1883, when William Sharon commenced an action in the Circuit Court of the United States for the district

1. Sharon v. Sharon, 67 Cal. 185; Sharon v. Sharon, 68 Cal. 29, 326; Sharon v. Sharon, Executor, etc., 75 Cal. 1; Sharon v. Sharon, 77 Cal. 102, Sharon v. Sharon, 79 Cal. 633; Sharon v. Sharon, 84 Cal. 424, 438; Sharon v. Hill, 10 Sawy, 48, 20 Fed. 1; Sharon v. Hill, 11 Sawy, 290, 26 Fed. 337; Sharon v. Terry, 13 Sawy. 387, 36 Fed. 337; Ex parte Terry, 128 U. S. 289, 32 Law Ed. 405; Terry et ux. v. Sharon, 131 U. S. 289, 33 Law Ed. 94; Cunningham, Sheriff of San Joaquin County, v. Neagle, 135 U. S. 1, 34 Law Ed. 55.

of California against Sarah Althea Hill for the purpose of obtaining a decree adjudging a certain instrument in writing in her possession, purporting to be a declaration of marriage between them, to be a forgery. The instrument read as follows:

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California, age twenty-seven years, do here, in the presence of Almighty God, take Senator William Sharon, of the state of Nevada, to be my lawful and wedded husband, and do hereby acknowledge and declare myself to be the wife of Senator William Sharon of the State of Nevada.

"Sarah Althea Hill.

"August 25, 1880, San Francisco, Cal.

"I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself see fit to make it known.

"S. A. Hill.

"In the city and county of San Francisco, state of California, on the twenty-fifth day of August, A. D. 1880, I, Senator William Sharon, of the state of Nevada, age sixty years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city and county of San Francisco, California, to be my lawful and wedded wife, do hereby acknowledge myself to be the husband of Sarah Althea Hill.

"William Sharon, Nevada.

"August 25, 1880."

The Mexican law, which prevailed in California when it was ceded to the United States, provided that no ceremony was necessary to the validity of a marriage. The law regulating marriage, adopted in 1850, provided that marriage was a civil contract, to which the consent of the parties was essential; but under the Civil Code adopted in 1872, while consent of the parties was requisite to marriage, it was also necessary that such consent be followed (1) by a solemnization or (2) by a mutual assumption of marital rights, duties or obligations. Under this provision, solemnization was not necessary. At the time Sarah Althea Hill produced the purported declaration of marriage, the law in California was that if there was a mutual assumption by the parties of marital rights, duties and obligations, a marriage was as valid and binding, in morals and in law, as a marriage solemnized by priests, minister or judge. This was the so-called "common law marriage."

On November 1, 1883, about four weeks after William Sharon had begun his action in the United States Circuit Court, Sarah Althea Hill commenced an action in the Superior Court of San Francisco against Senator Sharon to have the alleged marriage agreement between them declared valid, for a decree of divorce, and for a decree that she was entitled to one-half of the community property. The agreement with the attorney who represented her provided that he should get one-half of all property secured from William Sharon. There were numerous trials and other proceedings in the Superior Court of San Francisco and appeals to the Supreme Court of California, the final outcome of which was that it was held that the instrument was a forgery, that William Sharon and Miss Hill had never intermarried, and that she was not entitled to any of his property.

After the tragic killing of Terry, Neagle was arrested by Thomas Cunningham, the Sheriff of San Joaquin County, but was released on a writ of habeas corpus issued by the Circuit Court of the United States. An appeal was taken to the United States Supreme Court, which upheld the action of the Circuit Court. The story as set out in detail in Cunningham, Sheriff of San Joaquin County, v. Neagle, in the Supreme Court of the United States, is almost verbatim as follows:

Events Leading up to Tragedy

The killing of Terry by Neagle had its origin in a suit brought by William Sharon of Nevada in the Circuit Court of the United States for the District of California against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the Code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge Sawyer, the circuit judge for that circuit, and Judge Deady, United States district judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be indorsed 'cancelled,' and that the clerk write across it 'cancelled' and sign his name and affix his seal thereto."

The rendition of this decree was accompanied by two opinions, the principal one being written by Judge Deady and a concurring one by Judge Sawyer. They were very full in their statement of the fraud and forgery practiced by Miss Hill, and stated that it was also accompanied by prejury. And inasmuch as Mr. Sharon had died between the hearing of the argument of the case on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, nunc pro tunc.

Nothing was done under this decree. Sarah Althea Hill did not deliver up the instrument to the clerk to be canceled, but she continued to insist upon its use in the state court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the Circuit Court for the Northern District of California on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging also the intermarriage of Miss Hill with David S. Terry, and making Terry and his wife parties to the bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief.

Judge Sawyer Insulted

This case was argued in the circuit court before Field, Circuit Justice, Sawyer, Circuit Judge, and Sabin, District Judge. While the matter was held under advisement, Judge Sawyer, on returning

from Los Angeles, on August 14, 1888, where he had been holding court, found himself on the train as it left Fresno in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares,"—the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding "The best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two men who knew all the parties, and whose testimony was in the record before the court.

On September 3, the court (sitting in San Francisco) rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and during its delivery a scene of great violence occurred in the court room. It appears that shortly before the court opened on that day, both the defendants in the case came into the court room and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field there were present on the bench Judge Sawyer, and Judge Sabin of the District Court of the United States for the District of Nevada. The defendants had denied the jurisdiction of the court to render the original decree sought to be revived and the opinion of the court necessarily discussed this question before reaching the merits of the controversy. When allusion was made to this question, Mrs. Terry arose from her seat, and addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be canceled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice Field had been bought, and wanted to know the price for which he had sold himself; that he had got money for it, and everybody knew that he had, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the court room. She asserted that she would not go from the room, and that no one could take her from it.

The marshal proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, arose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present and forced down on his back. In the meantime Mrs. Terry was removed from the court room by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle.

Terry and Wife Imprisoned

For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect.

Terry and Mrs. Terry were separately indicted by the grand jury for the circuit court of the United States during the same term for their part in these transactions, and the cases were pending in the court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolver.

From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Justice Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that he was not through with Justice Field yet; and, while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Justice Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Justice Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Justice Field would resent it, he said: "If Judge Field resents it I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that they were "all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Justice Field some day.

Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Thomas T. Williams, editor of one of the daily newspapers of California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the court, he said that Justice Field had put a lie in the record about him, and when he met Field he would have to take that back, "and if he did not take it back and apologize for having lied about him, he would slap his face or pull his nose." "I said to him, 'Judge Terry, would not that be a dangerous thing to do? Justice Field is not a man who would permit anyone to put a deadly insult upon him like that.' He said, 'Oh, Field won't fight.' I said, 'Well, Judge, I have found nearly all men will fight; nearly every man will fight when there is occasion for it, and Judge Field has had a character in this State of having the courage of his convictions, and being a brave man.' At the conclusion of that branch of the conversa-

tion, I said to him, 'Well, Judge Field is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.' He said, 'Well, that's as good a thing as I want to get.' The whole impression conveyed to me by this conversation was, that he felt he had some cause of grievance against Judge Field; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight."

Williams said that after the return of Justice Field to California in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him.

The evidence was abundant that Terry and his wife contemplated some attack upon Justice Field when he came out to "ride the circuit" on the Pacific Coast, in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field, as soon as it became known that he was going to attend the circuit court in that year.

Neagle Appointed Guard

So much impressed were the friends of Justice Field, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney General of the United States, suggesting the propriety of his furnishing some protection to the Justice while in California. There was extensive correspondence between the Attorney General of the United States, the district attorney and the marshal of the Northern District of California on that subject, with the result that the marshal appointed Neagle, a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Justice Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Justice Field went from San Francisco to Los Angeles to hold the circuit court of the United States at that place, Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appeared from the uncontradicted evidence in the case that while the sleeping-car, in which were Justice Field and Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Justice Field. This resulted in no available aid to assist in keeping the peace.

When the train arrived, Neagle informed Justice Field of the presence of Terry on the train, and advised him to remain, and take his breakfast in the car. This the judge refused to do, and he and Neagle got out of the car and went into the dining room, and took seats beside each other in the place assigned them by the person in charge of the breakfast room, and very shortly after this Terry and his wife came into the room, and Mrs. Terry, recognizing Justice Field, turned and left in great haste, while Terry passed beyond where Justice Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating room, Terry arose from his seat, and passing around the table in such a way as brought him behind Justice Field, who did not see him or notice him, came up where Field was sitting and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this Terry turned his attention to Neagle, and, as Neagle testified, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

Judgment of Circuit Court Affirmed

In affirming the judgment of the Circuit Court in authorizing the discharge of Neagle from the custody of the Sheriff of San Joaquin County, the Supreme Court of the United States held that:

The justices of the supreme court are members of the circuit courts of the United States, and, while traveling to attend such courts, are in the discharge of a duty imposed by law.

The President has power to protect a judge of a court of the United States, who, while in the discharge of the duties of his office, is threatened with personal violence or death.

Authority from the Attorney General and district attorney of the United States is sufficient to warrant a marshal in making provisions for the protection and defense of a justice of the supreme court while in the discharge of his duty.

A deputy marshal of the United States, charged with the duty of protecting and guarding a judge of the United States court while in the discharge of his official duties against assault, being present at the critical moment when prompt action is necessary, is justifiable in killing the person making such assault, if necessary to protect the life of the judge.

In so doing the marshal is acting under the

laws of the United States and is not answerable for the act in the courts of the State.

Where the prisoner is held in the state court to answer for an act which he was authorized to do and which it was his duty to do as marshal of the United States, and in doing which he did no more than was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State.

Proceedings in State Courts

Sarah Althea Hill made an auspicious beginning in her litigation in the state courts. In the first trial in the Superior Court of San Francisco, a judgment was entered declaring that she and William Sharon had intermarried on the 25th of August, 1880, and the judgment was affirmed by the Supreme Court. On this appeal E. J. "Lucky" Baldwin was one of the sureties on William Sharon's bond. However, her victories were short-lived. After the Supreme Court had affirmed the judgment in her favor, the decree of the United States Circuit Court canceling the purported declaration of marriage was introduced in the proceedings in the state courts, and the Supreme Court of California took the position that the decree was binding on all other courts, inasmuch as William Sharon had started his action in the United States court a month before Sarah Althea Hill had commenced her action in the state court and, therefore, had acquired prior jurisdiction of the persons and subject matter. The Supreme Court of California directed a new trial, the result of which was that a decree was entered, on August 4, 1890, in the Superior Court that the parties had never intermarried and that the declaration of marriage was a forgery and, therefore, null and void; and that the plaintiff had no right or claim to any of the property of William Sharon. Once more an appeal was taken to the Supreme Court of California but during the pendency of the appeal, Sarah Althea Terry became insane. A guardian of her person and estate was appointed and it was ordered that he be substituted in the case. A few months later the appeal was dismissed—and the curtain was rung down on a drama which had begun nine years before.

The people of California finally decided that the policy of permitting unsolemnized marriages was unwise and in 1895 the legislature, to stop what was becoming a public scandal, amended the law so as to require not only the consent of the parties, but also a solemnization by either a judicial officer, priest or minister of the gospel of any denomination.

Many eminent counsel were engaged in the cases above mentioned. In the proceedings in Cunningham, Sheriff of San Joaquin County, v. Neagle in the Supreme Court of the United States, Joseph H. Choate and James C. Carter were associated with W. H. H. Miller, Attorney General of the United States, as counsel for Neagle. Cunningham was represented by G. A. Johnson, Attorney General of California, and Z. Montgomery. William Sharon, and after his death his legal representative, were represented by many eminent members of the California Bar, among them S. M. Wilson, William F. Herrin, F. G. Newlands, William M. Stewart, W. H. L. Barnes and Oliver P. Evans.

TENTATIVE PROGRAM OF LOS ANGELES MEETING

Monday, July 15
Section Meetings

MORNING SESSIONS:

Conference of Bar Association Delegates; Insurance Law; National Association of Attorneys General; Patent, Trademark and Copyright Law; Public Utility Law.

AFTERNOON SESSIONS:

Conference of Bar Association Delegates; Criminal Law; Insurance Law; Junior Bar Conference; Mineral Law; National Association of Attorneys General; Patent, Trademark and Copyright Law; Public Utility Law.

EVENING (DINNER) SESSIONS:

*See respective Section programs following outline program for week of meeting.

Tuesday, July 16
Section Meetings

MORNING SESSIONS:

Insurance Law; International and Comparative Law; Judicial Section and Committee on Administrative Law (Joint Session); Junior Bar Conference; Mineral Law; National Association of Attorneys General; National Conference of Bar Examiners; Patent, Trademark and Copyright Law; Public Utility Law; Real Property Law; Committee on Municipal Law; Open Meeting Committee on Unauthorized Practice of the Law.

AFTERNOON:

First General Session of the Association

Philharmonic Auditorium

Address of Welcome, by Gurney E. Newlin, Los Los Angeles, Cal.

Response to Address of Welcome, by Frederick H. Stinchfield, Minneapolis, Minn.

Annual Address of the President.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

Memorial to Charles A. Boston.

Meetings of State Delegations for Nomination of Members of General Council and Election of Members of State Councils.

EVENING SESSIONS:

Section Meetings and Dinners: Criminal Law—Dinner; Judicial Section and National Conference of Judicial Councils—Dinner; International and Comparative Law—Dinner; Junior Bar Conference—Dinner Dance; National Conference of Bar Examiners — Bar Examination Clinic; Patent, Trademark and Copyright Law—Dinner; Public Utility Law—Dinner Dance; Real Property Law—Legal Clinic.

Wednesday, July 17
Section and Committee Meetings

MORNING SESSIONS:

Criminal Law; International and Comparative Law; Judicial Section and National Conference of Judicial Councils—Joint Session; Junior Bar Conference; Legal Education; Real Property Law (to be followed by a Section Luncheon at 12:30); Open Meeting—Committee on Federal Taxation; Open Meeting—Committee on Municipal Law.

AFTERNOON:

Second General Session of the Association

Address by Benjamin Wham, Chicago, Ill.,

"The Barrister and the Solicitor in British Practice: The Desirability of a Similar Distinction in the United States."

(Prize paper in Ross Bequest Contest.)

National Bar Program

Topic: "Criminal Law and Its Enforcement."

"A State Department of Justice"—Earl Warren, District Attorney, of Alameda County, California.

"Toward a Better Criminal Law"—Dean Roscoe Pound of the Harvard Law School.

"Making Criminal Prosecution More Effective"—George Z. Medalie, former United States District Attorney for the Southern District of New York.

"The Attorney General's Program for Crime Control"—Justin Miller, Chairman of the Attorney General's Advisory Committee on Crime.

Discussion.

Election of Members of General Council.

EVENING: 8:00 O'CLOCK

Third General Session, National Bar Program

Philharmonic Auditorium

Address by John J. Parker, Judge U. S. Circuit Court of Appeals, Fourth Circuit, on "Professional Ethics."

"Making Disciplinary Procedure More Effective."

Speakers:

Fletcher Riley, Justice of the Supreme Court of Oklahoma.

Charles P. Megan, President of the Illinois Bar Association.

Orie L. Phillips, Judge of the United States Circuit Court of Appeals, Tenth Circuit.

10:00 P. M.

Biltmore Hotel

President's Reception and Dance.

Thursday, July 18

MORNING:

Fourth General Session of Association

Section and Committee Reports.

AFTERNOON:

Fifth General Session of Association

Topic: The Better Organization of the Bar:

Jefferson P. Chandler, Los Angeles, Cal.

Walter P. Armstrong, Memphis, Tenn.

Carl B. Rix, Milwaukee, Wis.

Charles E. Clark, Yale Law School, New Haven, Conn.

Earle W. Evans, Wichita, Kan.

Harry P. Lawther, Dallas, Tex.

Frank E. Atwood, Jefferson City, Mo.

James Grafton Rogers, Boulder, Col.

EVENING: 7:00 O'CLOCK—BILTMORE HOTEL

Annual Dinner of the Association.

Friday, July 19

MORNING:

Sixth General Session of the Association

Committee Reports.

Election of Officers.

Miscellaneous Unfinished Business.

Adjournment.

AFTERNOON:

Exhibition and Tea at Huntington Library, Pasadena.

EVENING:

Pageant,—"The Making of the Constitution," with prologue of the Revolutionary period, tableaux and epilogue of post-revolutionary period.

Tentative Programs of Committees, Sections and Other Organizations

Special Committee on Federal Taxation
Program of the Tax Clinic

Wednesday, July 17, 1935

10:00 A. M.-12:30 P. M.

"Social Security: What It Means to Taxpayers," Louis A. Lecher, Milwaukee, Wis.

"Cutting the Tax Pie," Forest D. Siefkin, Chicago, Ill.

"The Treasury Point of View," Arthur H. Kent, Assistant to Assistant General Counsel of the Treasury Department.

Discussion of Papers and Committee Report.

12:30. **Luncheon.**

1:15. "What a Circuit Court Judge Looks for in a Tax Appeal," Orie L. Phillips, Judge of United States Circuit Court of Appeals for the Tenth Circuit.

Special Committee on Municipal Law

Tuesday, July 16, 9:30 A. M.

Call to Order and statement of province of Section and outline of probable activities, William L. Ransom, Member of Executive Committee, American Bar Association.

Selection of Temporary chairman and Secretary, and announcement of Committees on By-Laws and on Nominations.

"Legal Problems of Financially Embarrassed Municipalities." Speakers: James H. Pershing, Denver, Colorado, and Edward J. Dimock, New York, N. Y.

"Legal Problems Involved in the Enforcement of Obligations Secured Solely by Publicly Owned Enterprises." Speaker: Edward H. Foley, Jr., of the Federal Emergency Administration of Public Works, Washington, D. C.

Wednesday, July 17, 9:30 A. M.

"Reorganization and Consolidation of Units of Local Government." Speaker: Gordon Whitnall, of the Committee on Governmental Simplification, Los Angeles.

"Legal Problems of Local Taxation." Speaker: Roger J. Traynor, of the University of California School of Jurisprudence, Berkeley.

"Fault of Service as a Basis for the Responsibility of the State." Speaker: Frederick F. Blachly, of The Brookings Institute, Washington, D. C.

Report of Nominating Committee; Election of Officers and Council; Adjournment.

Standing Committee on Unauthorized Practice of the Law

Tuesday Morning, July 16, at 10 o'Clock

Topics for Discussion:

1. Legal services rendered by laymen and lay agencies, exclusively to lawyers;

2. Practice before quasi-judicial boards, commissions, bureaus, officers, and similar agencies;

3. Practices of notaries public, real estate agents, real estate brokers, and the like;

4. Participation of lawyers in unlawful practice of the law and their discipline therefor.

Conference of Bar Association Delegates
Monday Morning, July 15th, at 10 o'Clock

Remarks by the Chairman, Oscar C. Hull, Detroit, Michigan.

Reports of Committees:

Rule Making Power of the Courts, Frank W. Grinnell, Boston, Massachusetts.

State Bar Integration, Carl V. Essery, Detroit, Michigan.

Judicial Selection, John Perry Wood, Los Angeles, California.

Co-operation Between Press and Bar, Giles Patterson, Jacksonville, Florida.

State and Local Bar Activities, Morris B. Mitchell, Minneapolis, Minnesota.

Discussion of this Report led by Arthur T. Vanderbilt, Newark, New Jersey. Other speakers to be announced later.

Address, "The Forgotten Lawyer," R. Allan Stephens, Springfield, Illinois.

Appointment of Nominating Committee.

Monday Afternoon at 2 o'Clock

Report of the Committee on Bar Reorganization, Philip J. Wickser, Buffalo, New York.

Address, "Suggestions for Improving the Conference of Bar Association Delegates," Carl B. Rix, Milwaukee, Wisconsin. General discussion.

Report of Nominating Committee.

Election of Officers.

Unfinished business.

Section of Criminal Law

Meetings of the Section will be held on Monday afternoon, July 15th, and on Wednesday morning, July 17th, with a dinner on Tuesday evening, July 16th.

In addition to the presentation and discussion of Section Committee Reports, three subjects have been selected as follows:

"The Place of the County in the Administration of Criminal Law"—Mr. Earl Warren, District Attorney, Alameda County, Calif.

"Interstate Compacts Relating to Criminal Law"—Mr. Gordon Dean, Criminal Division, Department of Justice, Washington, D. C.

"Police Protection in Industrial Disputes"—Mr. Paul Scharrenberg, Secretary, California State Federation of Labor.

Program in detail will appear in the Advance Program.

Section of Insurance Law
Monday Morning, July 15, at 10 o'Clock

Frank C. Haymond, Chairman, presiding

Address of Welcome, by Hon. Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California.

Response by Chairman of Insurance Law Section.

Report of Secretary.

Report of Special Committee on Membership; James E. Coleman, Chairman.

Report of Committee on Health and Accident Insurance Law; Frank E. Spain, Chairman.

Address by Vestor Joseph Skutt, Mutual Benefit Health and Accident Association, Omaha, Neb., "Rescission of Policies in Equity for Fraud.

Report of Committee on Automobile Insurance Law; Howard D. Brown, Chairman.

Address by Adlai H. Rust, General Counsel, State Farm Mutual Automobile Insurance Company, Bloomington, Ill., "Automobile Liability Insurance Trends."

Report of Committee on Life Insurance Law; Thomas B. Gay, Chairman.

Address, Lon O. Hocker, St. Louis, Mo., "Federal Declaratory Judgment Act—Its Application to Life Insurance."

Report of Special Committee on Amendments to Proposed Insurance Code; Walter L. Clark, Chairman.

Appointment of Nominating Committee.

Monday Afternoon, 2:30 o'Clock

Report of Committee on Fidelity and Surety Insurance Law; John A. Luhn, Chairman.

Address by Joe Crider, Jr., Los Angeles, Cal., "The Practical Side of Suretyship."

Report of Committee on Marine and Inland Insurance Law; George S. Brengle, Chairman.

Address by S. Brown Shepherd, Raleigh, N. C., "Comments on Contributions Among Sureties."

Report of Committee on Unemployment Insurance Law; Charles Denby, Jr., Chairman.

Address by A. H. Mowbray, Professor of Insurance, Department of Economics, University of California, Berkeley, Cal., "Unemployment Insurance—Possibilities and Limitations."

Report of Committee on Casualty Insurance Law; William O. Reeder, Chairman.

Monday Evening, 7 o'Clock

Annual Dinner for Members, Ladies and Guests.

Frank C. Haymond, Chairman, Toastmaster

Addresses:

Roderic Olzendam, Research Director, Metropolitan Life Insurance Company of New York, New York City, "Economic Security Legislation."

Frank J. Hogan, Washington, D. C.

Joe G. Sweet, San Francisco, Cal., "The Moving Pictures as a Fraud Detector."

Wednesday Morning, July 17, at 10 o'Clock

Report of Committee on Qualifications and Regulation of Insurance Companies; Howard C. Spencer, Chairman.

Report of Committee on Fire Insurance Law; Douglas W. Brown, Chairman.

Address by Hon. W. Dale Dunifon, First Assistant Attorney General of Ohio, Columbus, Ohio, "A Summary of the Year's Fire Insurance Cases."

Report of Committee on Workmen's Compensation and Employers' Liability Insurance Law; Clement F. Robinson, Chairman.

Address by H. Douglas Van Duser, Rochester, N. Y., "Privileged Communications."

Report of Special Committee on Automobile Guest Legislation; Harry E. Rodgers, Chairman.

Address by F. Robertson Jones, General Manager, Association of Casualty and Surety Executives, New York City, "Insurance and the Law."

Report of Special Committee on Unauthorized Insurance Companies; Theodore M. Bailey, Chairman.

Report of Special Committee on Federal Interpleader Legislation; Arthur G. Powell, Chairman.

Report of Nominating Committee.

Election of Officers.
Final Adjournment.

Section of International and Comparative Law
Tuesday, July 16, 10 A. M.

INTERNATIONAL LAW

Address by William S. Culbertson, American Diplomat and former member of the United States Tariff Commission—"Legal Aspects of the Trade Agreements Act of 1934."

Discussion.

Reports of Committees:

Publications; Phanor J. Eder, Chairman.

Cooperation with American Society of International Law, American Law Institute, American Branch of International Law Association, and American Foreign Law Association; James Oliver Murdock, Chairman.

7:00 P. M.

Dinner for Members, Ladies and Guests

Address by Roscoe Pound, Dean of Harvard Law School—"What We May Expect from Comparative Law."

Address by Hon. Elbert D. Thomas, United States Senator from Utah. (Subject to be announced.)

Wednesday, July 17, 10 A. M.

Symposium: The Validity of Foreign Divorces.

Hamilton Vreeland, Associate Professor of Law, Catholic University, Washington, D. C.

Manuel Ruiz, Jr., of the Los Angeles Bar.

Reports of Committees:

Simplification and Uniformity of Laws Governing Powers of Attorney Among Countries of the Pan American Union; David E. Grant, Chairman.

Double Taxation; Mitchell B. Carroll, Chairman.

Proof of Foreign Laws in Courts and Other Tribunals; Samuel Robert Wachtel, Chairman.

Military and Naval Law; Hugh Smith, Chairman.

Nominating Committee: John T. Vance, Chairman.

Election of Officers.

Judicial Section

The Judicial Section will join with the National Conference of Judicial Councils, and with the Special Committee on Administrative Law, in two sessions at 10 A. M.; July 16th and 17th. Morris A. Soper, United States Circuit Judge, Chairman of the Judicial Section, and Arthur T. Vanderbilt, Chairman of the National Conference of Judicial Councils, will preside. The address of welcome will be made by Chief Judge William H. Waste of the Supreme Court of California. The subject of discussion at the meetings will be "The Courts and the Administrative Agencies." It is expected that the meeting will be addressed by John Dickinson, Assistant Secretary of Commerce, United States District Judge William P. James, Los Angeles, Thomas D. Thacher, New York, Karl N. Llewellyn, Professor of Law, Columbia Law School, Max Radin, Professor of Law, University of California, John L. McNab, San Francisco, Hon. Robert L. Batt, Austin, Texas, John D. Clark, Cheyenne, Wyoming, and Louis G. Caldwell, Washington, D. C.

Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, will also address the sections in regard to the portrayal of court room scenes by newspapers and moving pictures.

The annual dinner of the sections will be held on Tuesday evening, July 16th, and will be addressed by the Honorable James M. Beck of Philadelphia and Washington, and the Honorable William Denman, United States Circuit Judge, San Francisco.

Legal Education and Admissions to the Bar
Wednesday, July 17, at 10 A. M.

General Topic: "Is Legal Education Making the Proper Contribution to the Public Service?"

Discussion. (Speakers to be announced later.)

Mineral Law Section
Monday, July 15, at 10 A. M., Biltmore Hotel.

P. C. Spencer, Chairman, presiding.

Reading of Minutes: 1. Synopsis of Minutes, Milwaukee. 2. Minutes of meeting of Mineral Section Council and Committee of Nine, Tulsa, Okla., March 6, 1935.

Report of Chairman Spencer.

Disposition of routine matters.

Report of Committee to prepare and present memorial to Hon. Chester I. Long, by H. O. Caster of New York City.

Address by James C. Denton of Tulsa, Okla., "The Petroleum Industry under NIRA."

Discussion.

Address by Charles I. Francis of Houston, Texas, "Divorcement of Pipelines."

Discussion.

2:00 P. M.

Address by Robert E. Hardwicke of Fort Worth, Texas, "The Rule of Capture and Its Implications as Applied to Oil and Gas."

Discussion.

"Unit Operation Agreements on Public Lands," by George W. Holland, Senior Attorney, Office of the Solicitor, U. S. Department of the Interior, and LeRoy H. Hines, Assistant Legal Adviser, Office of the Solicitor, U. S. Department of the Interior, to be presented by Herman Stabler, Chief, Conservation Branch, U. S. Geological Survey, Washington, D. C.

Tuesday, July 16, at 10 A. M.

Report of Nominating Committee.

Address by J. Howard Marshall, Petroleum Administrative Board, Washington, D. C., "Federal Control of the Oil Industry."

Discussion.

Address by Rush M. Blodget of Los Angeles, "Control of Petroleum Industry Through Interstate Compacts."

Discussion.

Address by General Francisco Mugica, Secretary of National Economy, Mexico City, "Governmental Control of the Petroleum Industry in Mexico."

Discussion.

Section of Patent, Trademark & Copyright Law
Monday and Tuesday, July 15 and 16.

George L. Wilkinson, Chairman, presiding.

Sessions will be held at 10 A. M. and 2 P. M. on Monday and at 10 A. M. on Tuesday.

Reports of Section Committees and new matters that may be brought up will be presented and considered.

The Annual Dinner for Members, Ladies and Guests will be held on Tuesday evening at 7 o'clock.

Section of Public Utility Law

Monday Morning, July 15, 1935.

9:00 A. M. Meeting of Council.

10:00 A. M. First Session of Section.

Address of Welcome, Hon. Leon O. Whitsell, President, Railroad Commission of California.

Annual Address of Chairman of Section.

Appointment of Nominating Committee.

Report of Standing Committee "To Survey and Report as to Developments During the Year in the Field of Public Utility Law." Harold J. Gallagher, Chairman.

Address. (Speaker and subject to be announced.)

Discussion.

Monday Afternoon.

2:00 P. M. Second Session of Section.

Report of Special Committee "To Survey and Report Upon the Developments in the Regulation of Highway Transportation in Relation to Railroads." Ivan Bowen, Chairman.

Address. (Speaker and subject to be announced.)

Discussion.

Tuesday Morning, July 16, 1935.

10:00 A. M. Third Session of Section.

Report of Special Committee "To Survey and Report upon the Developments in Federal and State Regulation of the Communication Utilities." Edwin M. Borchard, Chairman.

Address. (Speaker and subject to be announced.)

Discussion.

Report of Nominating Committee.

Annual Election of Officers and Members of Council.

Unfinished Business.

Adjournment.

Tuesday Evening

7:00 P. M. Annual Dinner Dance.

Section of Real Property Law

Tuesday Morning, July 16, at 10 o'Clock

Reports of Committees and Discussion—Chairman of Section presiding.

Suggested Changes in Major Substantive Principles—Dean Charles E. Clark.

Real Property Financing—Horace Russell.

Improvement of Title Records—George E. Beers.

Improvement in Conveyancing Practice — Thomas H. Scott.

Cooperation and State Bar Assistance—

Public Relations—

Bibliography—

Appointment of Nominating Committee.

Tuesday Evening, July 16, — o'Clock

Legal Clinic—Henry Upson Sims, presiding.

Comparison of Real Property Practice in Different States.

In closing real estate transactions:

With title insurance and escrow agreements—

With abstract and attorney's opinion—

With lawyer's title search and opinion—

With Torrens certificate of title—

In foreclosing real estate securities—

Allowable extent of performance by laymen—

Wednesday Morning, July 17, at 10 o'Clock

Symposium, Real Property Practice — George E. Beers, presiding.

In a Metropolitan Law Office—

In a Country Law Office—

By the Institutional Salaried Lawyer—

In Government Agencies—

Report of Committee on Nominations. Election.

Wednesday Afternoon, at 12:30 o'Clock.

Section Luncheon—Nathan William MacChesney, presiding.

Junior Bar Conference

Sunday Evening, July 14th, at 8 o'Clock.

Informal smoker under the auspices of Junior Barristers of Los Angeles Bar Association.

Monday Morning, July 15, at 10 o'Clock.

First Session of the Conference, Lavergne F. Guinn, Dallas, Texas, presiding.

Address of Welcome, E. Avery Crary, Los Angeles, Calif.

Response to Address of Welcome, by Joseph Stecher, Toledo, Ohio.

Greetings from the President of the American Bar Association, Hon. Scott M. Loftin, Jacksonville, Florida.

Introduction of Officers and members of the Council of the Junior Bar Conference.

Report of the Chairman, Samuel S. Willis, Detroit, Michigan.

Reports of Convention Committees.

Reports of Principal Conference Committees.

Announcement of Personnel of Nominating Committee, Samuel S. Willis, Detroit, Michigan.

Monday Evening, at 8 o'Clock.

Stag Smoker, Balvoa Tap Room.

Tuesday Morning, July 16, 10 o'Clock.

Second Session of the Conference, Walter L. Brown, Huntington, W. Va., presiding.

Address by Hon. James Grafton Rogers, Dean of the University of Colorado Law School,—"The New Generation of Lawyers."

Open discussion on the subject "The Program and Activities of the Junior Bar Conference for 1935-36," to be inaugurated by an address by William A. Roberts, Washington, D. C.

Report of Nominating Committee.

Nominations from the floor for the office of Chairman, Vice-Chairman, Secretary and members of the Council.

Tuesday Afternoon, at 12:30 o'Clock.

Luncheon of Council Junior Bar Conference as guests of Executive Council of Junior Barristers of Los Angeles Bar Association.

Tuesday Evening, at 9 o'Clock.

Dinner Dance for members of the Conference Ladies and Guests.

(Continued on pgae 383)

AMERICAN BAR ASSOCIATION JOVRNAL

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Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues. Price per copy, 25 cents.

JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

FEDERAL PROCEDURE

In this number we print the remarks of the Chief Justice before the annual meeting of the American Law Institute held at the Hotel Mayflower, Washington, D. C., on Thursday morning, May 9, 1935.

The members of the Institute have come to expect that their opening sessions would always be thus distinguished and adorned.

The Chief Justice has signalized these occasions by many important pronouncements, but none of them have been more important than the one to which we are now referring.

He announced the decision of the Court to press at once towards the final objective, which he declared to be, "a unified system of rules for cases in equity and actions at law."

To those still wedded to the common law and the maintenance of the historic distinctions between law and equity, these words, quoted from his address, are reassuring: "Of course, I am not speaking of distinctions between law and equity in the matter of substantive rights, but of mere procedure where a unified practice may be had consistently with all substantive rights."

There is reassurance and inspiration also in his definition of another feature of the Court's objective which we quote in full: "It is manifest that the goal we seek is a simplified practice which will strip procedure of unnecessary forms, technicalities, and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances."

The profession may be thankful for this assurance from the highest source that we are not to have a rigid code of procedure dealing with every conceivable detail. The Chief Justice showed his full appreciation of the evils arising from complex detailed codes when he said: "It is true that in certain jurisdictions, and in one with which I happen to be especially familiar, the simple form of unified procedure originally adopted came to be overlaid with procedural monstrosities due to legislative tinkering and elaboration. Such experiences have taught a lesson, and in the improvement we contemplate in the federal system we shall have the advantage of the simplicity and flexibility made possible by the exercise on the part of the Court of its rule-making power."

On June 19, 1777, Congress passed an Act which made Washington the Commander-in-Chief of the American forces, put an end to the evils of divided control and conflict of authority and had a profound effect in the establishment of our great republic.

The Act of June 19, 1934, gives the Supreme Court of the United States similar command of the forces engaged in the campaign for an improvement in the methods of judicial procedure by the restoration to the judicial department of an ancient power, the power to decide for itself the manner in which it shall perform its great duties.

BUILDING ON SURE FOUNDATIONS

No one can say when the movement for a closer formal connection between the American Bar Association and the State and Local Bar Associations will be achieved or what form that connection will take. But there can be little doubt that the foundations for the structure are being laid today. Every move made by a State or Local Association in cooperation with the National Bar Program, every presentation of the message of Bar Coordination as an ideal to representative members of the Bar—as is being notably done at various regional meetings—broadens and strengthens the psychological foundation for the great undertaking.

And that is the only sure foundation. Neither Bar Coordination nor anything else can be imposed on the Bar of the country by a single organization or by any form of what may be regarded as outside pressure. It must come, when it does come, through

the willing acceptance of those who understand the reasons for it and who have had the fullest opportunity to express their views and to aid in shaping the final result. The process may be a little slower than many would wish, but it has the advantage of leading to assured results.

Of the National Bar Program as one of the main agencies for bringing about the needed union of minds, it is not necessary to speak here at length. Its value is attested by the recommendation of the Committee on Coordination, approved by the Executive Committee, that the work be continued vigorously, as "it has proved effective in bringing about concerted action by the National, State and Local Bar Associations in the interest of the profession and the public." A newer instrument for achieving this desirable end is the regional meeting, which is just beginning to demonstrate its possibilities. The regional meeting may, of course, consider any subject that it wishes, but the National Bar Program and Bar Coordination, under present circumstances, are sure to bulk large on the program of discussion.

These meetings have already been held in Boston, New York City and Decatur, Ill., one will soon be held in New Jersey, and another is planned for Missouri in September. The one just held in Illinois affords a real demonstration of the interest of the Bar in the subject of Bar Coordination and the value of such gatherings as a means of bringing out the opinions of the profession and stimulating interest in the general movement. It was one of the most successful gatherings of this kind which the Association has yet sponsored, and may be taken as a typical forerunner of others to come.

Representatives of active bar associations from Illinois and a half dozen States surrounding it were invited, and in addition there was representation from Florida, in the person of the President of the American Bar Association, from Minnesota by a member of the Executive Committee, and from Arkansas by a Vice-President. A Vice-President from Indiana presided. The subject of national organization of the bar brought forth much interesting comment, but, as might be expected at this stage, very little unanimity of opinion. There was an attendance of 125 at the session, and sentiments voiced from the floor after the scheduled speeches were over showed plainly that the bar is vitally concerned with arriving at some method of closer formal connection.

The Annual Meeting of the Association, of course, affords another great opportunity for carrying the message of Bar Coordination to the profession and of learning its reactions to the idea. The Executive Committee, therefore, at its Washington meeting and in accordance with the recommendation of the Committee on Coordination, decided to devote an afternoon session to the subject of the better organization of the Bar, to which session the State and Local Bar Associations will be invited to send representatives or submit written statements of their views. It was also decided that at this session there should be a full opportunity for discussion by members of the Association.

All that the Association has done or is doing in connection with the movement is, of course, based on recognition of the fact that in the end the opinion of the Bar will rule, and that frequent and informed discussion is needed at this stage to lay a sound basis for decision. When that is well done, the next step should present little real difficulty.

"THE MAKING OF THE CONSTITUTION"

When the Kansas City Bar Association several years ago presented its production, "The Making of the Constitution," it builded better than it knew. It not only gave an entertainment of vital interest to the profession but it demonstrated the fact that the incidents connected with that event could be made as interesting to laymen as to lawyers. The newspaper report of the immense meeting at which the production was presented left no doubt that the audience was in full sympathy with the characters and the purpose of the great drama.

It not only did this but it set a precedent which has already been followed at Cleveland, Los Angeles and Philadelphia, and which is sure to be increasingly followed in the future. The text generally used, we understand, follows closely the selected portions of the debates which were chosen for the original production. It may be added that this part of the work was done with genuine skill and sense of dramatic significance. And now the pageant-play is to be produced again—this time at the meeting of the American Bar Association at Los Angeles and by the cast which presented it so successfully to an immense audience in that city. Members will doubtless welcome the opportunity to see it.

REVIEW OF RECENT SUPREME COURT DECISIONS

Railroad Retirement Pension Act Held Unconstitutional on Ground That Certain Inseparable Provisions Violate Due Process Clause of Fifteenth Amendment and on Further Ground That Its Purpose to Provide Security for a Particular Class of Employes Is Not a Regulation of Interstate Commerce—Principles of Equity Do Not Require Carrier to Make Restitution When Charges Have Been Collected Under an Order of the Interstate Commerce Commission Defective for Errors in Procedure, Where Defects Were Later Remedied—Proper Construction of Provision of Bankruptcy Act Prescribing Basis for Computing Referee's Compensation — Due Process Violated in Georgia Paving Assessment Case

By Edgar Bronson Tolman*

Constitutional Law—Validity of Act of Congress Prescribing Pension System for Railroad Employees—Due Process—Limitation on Power Over Interstate Commerce

The Railroad Retirement Act is unconstitutional, for the reason that certain of its provisions violate the due process clause of the Fifth Amendment, and such provisions being inseparable from other provisions, the Act as a whole is invalid.

The Act is unconstitutional on the further ground that its purpose is to provide security for a particular class of employees against old age dependence, and, as such, is not a regulation of commerce and is therefore beyond the powers delegated to Congress under the commerce clause of the Constitution.

Railroad Retirement Board v. Alton Railroad Company et al., 79 Adv. Op., 803; 55 Sup. Ct. Rep., 758.

In this case the Court passed on the constitutional validity of the Railroad Retirement Act, which establishes a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. By a majority of one, the Court held the Act unconstitutional, on two grounds; first, that certain of its provision violate the due process clause of the Fifth Amendment, and being inseparable, condemn the whole Act; and, second, that the Act is not in purpose or effect a regulation of interstate commerce, under the Constitution.

The case arose on suit of 143 Class I Railroads, brought in the Supreme Court of the District of Columbia, to enjoin enforcement of the Act. That court granted the injunction sought, taking the view that, although the establishment of such a system was within Congressional power, several inseparable features of the Act were invalid, and that the law was, therefore, void as a whole. On certiorari the decree was affirmed, on the grounds above mentioned. Mr. Justice Roberts delivered the majority opinion, while the Chief Justice presented the views of the minority.

The majority opinion discusses various aspects of the case in the following order: the contention that the Act is arbitrary in that it makes certain persons eligible for pensions on the basis of prior service, and includes prior service in determining the amount of pensions of persons previously in carrier service in the event that they later return to such service; certain special features alleged to be violative of due process; certain general features, such as that the Act violates due process because it sets up a unitary pension system, and that it imposes an unconscionable burden; and, finally, that the Act is not a regulation of commerce.

The Act establishes a compulsory retirement and pension system for all carriers subject to the Interstate Commerce Act. It provides for the creation of a fund to be administered by a Board. The fund is to be raised by compulsory contributions, in specified amounts, of both employers and employees, each carrier to pay double the total payable by its employees. The contributions are based on percentages of current compensation, the amount of the percentage to be fixed by the Board. Until it determines otherwise, the employee is to contribute 2%. Out of the fund annuities are to be paid to beneficiaries.

Persons eligible for pensions are (1) employees of any carrier on the date of passage of the Act; (2) those who subsequently become employees of any carrier; and (3) those who within one year prior to the date of enactment were in the service of any carrier. Every such person becomes entitled to an annuity: (a) when he reaches the age of 65 years, whether then in carrier service or not; if in such service, he and his employer may agree that he shall remain in service until he is 70, at which age he must retire; (b) at the option of the employee, at any time between the ages of 51 and 65, if he has served a total of 30 years in the employ of one or more carriers, whether continuously or not. The compulsory retirement provision is not applicable to those in official positions until 5 years after the effective date of the Act.

The pension is payable monthly. Its amount is determined by multiplying the number of years, not exceeding 30, before as well as subsequent to the date the Act was adopted, whether for a single carrier or a number of carriers, and whether continuous or not, by graduated percentages of the average monthly compensation (excluding all over $300 per month). If any one who has completed 30 years of service elects to retire before he is 65 years of age, the annuity is reduced by 1/15th for each year he lacks of that age, unless retirement is due to physical or mental disability.

On the death of an employee, before or after retirement, his estate is to be repaid all that he has con-

*Assisted by James L. Homire.

tributed to the fund, with 3% compounded annually, less any annuity payments received by him.

The first feature of the Act which was considered was that which makes eligible for pension all who were in carrier service within 1 year prior to its passage, irrespective of future employment. About 146,000 fall within this class, including those discharged for cause, those retired, those who resigned for other employment, those whose positions were abolished, those temporarily employed, and those who left the service for other reasons. It was agreed in both the majority and dissenting opinions that this provision was arbitrary. As to it, MR. JUSTICE ROBERTS said:

> . . . It is arbitrary in the last degree to place upon the carriers the burden of gratuities to thousands who have been unfaithful and for that cause have been separated from the service, or who have elected to pursue some other calling, or who have retired from the business, or have been for other reasons lawfully dismissed. And the claim that such largess will promote efficiency or safety in the future operation of the railroads is without support in reason or common sense.

In addition to this class, there are over 1,000,000 persons who have previously been in carrier service. The railroads challenged the statute as arbitrary to the extent that it makes their prior service the basis for computing their pensions in the event that they ever return to carrier service. This objection was likewise sustained. With respect to it the opinion states:

> . . . Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier. The provision is not only retroactive in that it resurrects for new burdens transactions long since past and closed; but as to some of the railroad companies it constitutes a naked appropriation of private property upon the basis of transactions with which the owners of the property were never connected. Thus the act denies due process of law by taking the property of one and bestowing it upon another. This onerous financial burden cannot be justified upon the plea that it is in the interest of economy, or will promote efficiency or safety. The petitioners say that one who is taken back into service will no doubt render more loyal service since he will know he is to receive a bonus for earlier work. But he will not attribute this benefaction to his employer. The argument comes merely to the contentment and satisfaction theory discussed elsewhere. The petitioners also argue that if the provision in question threatens an unreasonable burden, the carriers have in their own control the means of avoidance, since no carrier need employ any person who has heretofore been in the railroad business. The position is untenable for several reasons. A carrier may wish to employ one having experience, who has been in another's service. Must it forego the opportunity because to choose the servant will impose a financial obligation arising out of an earlier employment with some other railroad? Would that promote efficiency and safety? The testimony shows that 22 per cent of all railway employees have had prior service on some railroad. Must a carrier at its peril exercise, through dozens of employment agencies scattered over a vast territory, an unheard of degree of care to exclude all former railroad workers at the risk of incurring the penalty of paying a pension for work long since performed for some other employer? So to hold would be highly unreasonable and arbitrary.

The railroads further challenged the provision allowing pensions to those at 65, who are in carrier service but a limited time. They contended that such a provision is not a reasonable regulation of commerce, and that it is not an aid to economy, efficiency or safety. Sustaining this contention, and rejecting the petitioners' answer thereto that the provision improves morale of employees while in service, MR. JUSTICE ROBERTS said:

> . . . Assurance of security it truly gives, but, quite as truly, if 'morale' is intended to connote efficiency, loyalty and continuity of service, the surest way to destroy it in any privately owned business is to substitute legislative largess for private bounty and thus transfer the drive for pensions to the Halls of Congress and transmute loyalty to employer into gratitude to the Legislature.

The railroads challenged the Act further, on the ground that the provision conferring pension rights on one retiring before the age of 65 (though at rates reduced 1/15th for each year under 65), does not promote economy, efficiency or safety, and is not permissible. This contention was also upheld.

Considerable emphasis was placed on the objection to the statute that it is retroactive, in prescribing that prior service shall be included in the basis for compulsory payments. As to this the majority opinion states:

> This clearly arbitrary imposition of liability to pay again for services long since rendered and fully compensated is not permissible legislation. The court below held the provision deprived the railroads of their property without due process, and we agree with that conclusion. Here again the petitioners insist that the requirement is appropriate, because, they say, it does not demand additional pay for past services, but expenditure 'for a present and future benefit through improvement of the personnel of the carriers.' But the argument ends with mere statement. Moreover, if it were correct in its assumption, which we shall presently show it is not, nevertheless, there can be no constitutional justification for arbitrarily imposing millions of dollars of additional liabilities upon the carriers in respect of transactons long closed on a basis of cost with reference to which their rates were made and their fiscal affairs adjusted.

General features, in relation to the Fifth Amendment, were then considered. First among these, was the unitary nature of the system, which treats all railroads as a single carrier, irrespective of the average age of service entry on various roads and irrespective of other differences. This underlying basis of the system, through its imposition of unequal burdens on various carriers, was also thought to be unconstitutional. As to this the opinion declared:

> This court has repeatedly had occasion to say that the railroads, though their property be dedicated to the public use, remain the private property of their owners, and that their assets may not be taken without just compensation. The carriers have not ceased to be privately operated and privately owned, however much subject to regulation in the interest of interstate commerce. There is no warrant for taking the property or money of one and transferring it to another without compensation, whether the object of the transfer be to build up the equipment of the transferee or to pension its employees.

Further developing this line of thought, MR. JUSTICE ROBERTS went on to distinguish cases relied on in support of the pooling principle, and stated:

> We conclude that the provisions of the act which disregard the private and separate ownership of the several respondents, treat them all as a single employer, and pool all their assets regardless of their individual obligations and the varying conditions found in their respective enterprises, cannot be justified as consistent with due process.

Finally, as to the whole case considered in the light of the due process clause, the majority concluded that the invalid provisions were so inseparable from its other terms as to render the Act invalid in its entirety.

The case was then considered from the standpoint of the power of Congress to regulate interstate commerce.

> It results from what has now been said that the act is invalid because several of its inseparable provisions contravene the due-process-of-law clause of the Fifth Amendment.

> We are of opinion that it is also bad for another reason which goes to the heart of the law, even if it could suryive the loss of the unconstitutional features which we have discussed. The act is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution.

In connection with this aspect of the case, the legislative purposes enumerated in the Act itself were cited. These purposes, and the one principally relied on in support of the Act, were discussed as follows:

> Several purposes are expressed in Section 2 (A), amongst them: To provide "adequately for the satisfactory retirement of aged employees"; "to make possible greater employment opportunity and more rapid advancement"; to provide by the administration and construction of the act "the greatest practicable amount of relief from unemployment and the greatest possible use of resources available for said purpose and for the payment of annuities for the relief of superannuated employees." The respondents assert and the petitioners admit that though these may in and of themselves be laudable objects, they have no reasonable relation to the business of interstate transportation. The clause, however, states a further purpose, the promotion of "efficiency and safety in interstate transportation," and the respondents concede that an act, the provisions of which show that it actually is directed to the attainment of such a purpose, falls within the regulatory power conferred upon the Congress; but they contend that here the provisions of the statute emphasize the necessary conclusion that the plan is conceived solely for the promotion of the stated purposes other than efficient and safe operation of the railroads. The petitioners' view is that this is the true and only purpose of the enactment and the other objects stated are collateral to it and may be disregarded if the law is found apt for the promotion of this legitimate purpose. From what has already been said with respect to sundry features of the statutory scheme, it must be evident that petitioners' view is that safety and efficiency are promoted by two claimed results of the plan: the abolition of excessive superannuation and the improvement of morale.

After discussing the findings regarding these features, the conclusion was reached that the Act in its fundamental purpose and effect is a measure designed to promote the social security of the employees, which is not included within the powers delegated to Congress to regulate interstate commerce.

> In final analysis, the petitioners' sole reliance is the thesis that efficiency depends upon morale, and morale in turn upon assurance of security for the worker's old age. Thus pensions are sought to be related to efficiency of transportation, and brought within the commerce power. In supporting the act the petitioners constantly recur to such phrases as "old age security," "assurance of old age security," "improvement of employee morale and efficiency through providing definite assurance of old age security," "assurance of old age support," "mind at ease," and "fear of old age dependency." These expressions are frequently connected with assertions that the removal of the fear of old age dependency will tend to create a better morale throughout the ranks of employees. The theory is that one who has an assurance against future dependency will do his work more cheerfully, and therefore more efficiently. The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type is in any just sense a regulation of interstate transportation. If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement.
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> We think it cannot be denied, and, indeed, is in effect admitted, that the sole reliance of the petitioners is upon the theory that contentment and assurance of security are the major purposes of the act. We cannot agree that these ends if dictated by statute, and not voluntarily extended by the employer, encourage loyalty and continuity of service. We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat non-contractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation.

The CHIEF JUSTICE, in his dissenting opinion, emphasized the far-reaching effect of the decision, especially as it erects a barrier to all legislative action bearing on the subject matter.

> I am unable to concur in the decision of this case. The gravest aspect of the decision is that it does not rest simply upon a condemnation of particular features of the Railroad Retirement Act, but denies to Congress the power to pass any compulsory pension act for railroad employees. If the opinion were limited to the particular provisions of the act, which the majority find to be objectionable and not severable, the Congress would be free to overcome the objections by a new statute. Classes of persons held to be improperly brought within the range of the act could be eliminated. Criticisms of the basis of payments, of the conditions prescribed for the receipt of benefits, and of the requirements of contributions, could be met. Even in place of a unitary retirement system another sort of plan could be worked out. What was thus found to be inconsistent with the requirements of due process could be excised and other provisions substituted. But after discussing these matters, the majority finally raise a barrier against all legislative action of this nature by declaring that the subject matter itself lies beyond the reach of the congressional authority to regulate interstate commerce. In that view, no matter how suitably limited a pension act for railroad employees might be with respect to the persons to be benefited, or how appropriate the measure of retirement allowances, or how sound actuarily the plan, or how well adjusted the burden, still under this decision Congress would not be at liberty to enact such a measure. That is a conclusion of such serious and far-reaching importance that it overshadows all other questions raised by the act. Indeed, it makes their discussion superfluous. The final objection goes, as the opinion states, "to the heart of the law, even if it could survive the loss of the unconstitutional features" which the opinion perceives. I think that the conclusion thus reached is a departure from sound principles and places an unwarranted limitation upon the commerce clause of the Constitution.

Reference was then made to the wide scope of the power of Congress to regulate interstate commerce, as judicially determined by previous decisions of the Court, and to various acts of Congress which have been upheld governing the conditions of employment and the relations between employers and employees. After enumerating these, the CHIEF JUSTICE urged that the argument that a pension measure is beyond the limits of regulatory power, is largely answered by the practice of the carriers themselves in establishing voluntary pension systems. As to this the minority opinion states:

> The argument that a pension measure, however sound and reasonable as such, is per se outside the pale of the regulation of interstate carriers, because such a plan could not possibly have a reasonable relation to the ends which Congress is entitled to serve, is largely answered by the practice of the carriers themselves. Following precedents long established in Europe, certain railroad companies in the United States set up voluntary pension systems many years ago.

> It appears that the first of these was established in 1884, another was adopted in 1900. By 1910 formal pensions plans covered 50 per cent of all railroad employees, and by 1927 over 82 per cent. In establishing these plans the carriers were not contemplating the payment of a largess unrelated to legitimate transportation ends. Their witnesses say the carriers aimed at loyalty and continuity of service. However limited their motives, they acted upon business principles. Pension plans were not deemed to be essentially foreign to the proper conduct of their enterprises. But if retirement or pension plans are not per se unrelated to the government of transportation operations, Congress could consider such plans, examine their utility, and reach its own conclusions. If the subject matter was open to consideration, Congress was not limited to the particular motives which inspired the plans of the carriers.

Reference was made to the controversy between the parties (referred to also in the majority opinion), as to the amount of superannuation among railroad employees, and the necessity for removal thereof. As to this the minority of the Court took the position that the extent of superannuation is at least debatable, and therefore a matter as to which the legislative judgment should be conclusive.

But, aside from that, the view was taken that a pension system, affecting the morale of employees, is an appropriate means of fostering the efficiency of the service. As to this the CHIEF JUSTICE said:

> Laying that question on one side, I think that it is clear that the morale of railroad employees has an important bearing upon the efficiency of the transportation service, and that a reasonable pension plan by its assurance of security is an appropriate means to that end. Nor should such a plan be removed from the reach of constitutional power by classing it with a variety of conceivable benefits which have no such close and substantial relation to the terms and conditions of employment. The appropriate relation of the exercise of constitutional power to the legitimate objects of that power is always a subject of judicial scrutiny. With approximately 82 per cent of railroad employees, 90 per cent of those employed in cable, telephone and telegraph companies, and about one-half of those in the service of electric railways, light, heat and power companies under formal pension plans, with the extensive recognition by national, State and local governments of the benefit of retirement and pension systems for public employees in the interest of both efficiency and economy, it is evident that there is a widespread conviction that the assurance of security through a pension plan for retired employees is closely and substantially related to the proper conduct of business enterprises.
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> But with respect to the carriers' plans, we are told that as they were framed in the desire to promote loyalty and continuity of service in the employment of particular carriers, the accruing advantages were due to the fact that the plans were of a voluntary character. In short, that the reaction of the employees would be simply one of gratitude for an act of grace. I find no adequate basis for a conclusion that the advantages of a pension plan can be only such as the carriers contemplated or that the benefit which may accrue to the service from a sense of security on the part of employees should be disregarded. In that aspect, it would be the fact that protection was assured, and not the motive in supplying it, which would produce the desired result. That benefit would not be lost because the sense of security was fostered by a pension plan enforced as an act of justice. Indeed, voluntary plans may have the defect of being voluntary, of being subject to curtailment or withdrawal at will. And the danger of such curtailment or abandonment, with the consequent frustration of the hopes of a vast number of railroad workers and its effect upon labor relations in this enterprise of outstanding national importance, might well be considered as an additional reason for the adoption of a compulsory plan. . . . There was also testimony (by Mr. Eastman) that "the experience with the voluntary pension systems has been unsatisfactory," that "the depression brought clearly to light their many weaknesses and uncertainties."
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> The argument in relation to voluntary plans discloses the fundamental contention on the question of constitutional authority. In substance, it is that the relation of the carriers and their employees is the subject of contract; that the contract prescribes the work and the compensation; and that a compulsory pension plan is an attempt for social ends to impose upon the relation non-contractual incidents in order to insure to employees protection in their old age. And this is said to lie outside the power of Congress in the government of interstate commerce. Congress may, indeed, it seems to be assumed, compel the elimination of aged employees. A retirement act for that purpose might be passed. But not a pension act. The government's power is conceived to be limited to a requirement that the railroads dismiss their superannuated employes, throwing them out helpless, without any reasonable provision for their protection.
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> The argument pays insufficient attention to the responsibilities which inhere in the carriers' enterprise. Those responsibilities, growing out of their relation to their employees, cannot be regarded as confined to the contractual engagement. The range of existing Federal regulation of interstate carriers affords many illustrations of the imposition upon the employer-employee relation of non-contractual incidents for social ends. A close analogy to the provision of a pension plan is suggested by the familiar examples of compensation acts. The power of Congress to pass a compensation act to govern interstate carriers and their employees engaged in interstate commerce does not seem to be questioned. The carriers might thus be compelled to provide appropriate compensation for injuries or death of employees, although caused without fault on the carriers' part.

Further emphasizing the analogy between pension measures and compensation measures, the learned CHIEF JUSTICE added:

> When we go to the heart of the subject, we find that compensation and pension measures for employees rest upon similar basic considerations. In the case of compensation acts, the carrier has performed his contract with the employee, has paid the agreed wages, has done its best to protect the employee from injury, is guilty of no neglect, but yet is made liable for compensation for injury or for death which ends the possibility of future service, because in the development of modern enterprises, in which accidents are inevitable, it has come to be recognized that the industry itself should bear its attendant risks. . . . An attempted distinction as to pension measures for employees retired by reason of age, because old age is not in itself a consequence of employment, is but superficial. The common judgment takes note of the fact that the retirement of workers by reason of incapacity due to advancing years is an incident of employment and that a fair consideration of their plight justifies retirement allowances as a feature of the service to which they have long been devoted. This is recognized as especially fitting in the case of large industrial enterprises and of municipal undertakings such as police and fire protection, where there are stable conditions of employment in which workers normally continue so long as they are able to give service and should be retired when efficiency is impaired by age. What sound distinction, from a constitutional standpoint, is there between compelling reasonable compensation for those injured without any fault of the employer, and requiring a fair allowance for those who practically give their lives to the service and are incapacitated by the wear and tear of time, the attrition of the years? I perceive no constitutional ground upon which the one can be upheld and the other condemned.
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> The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable.

The dissenting opinion then dealt with the objections based on the due process clause of the Fifth Amendment. Of these objections, the unitary or pooling provisions was first discussed. As to it, the opinion states that a unitary or group system of compensation embraced in state laws has been sustained. Like reasoning has been followed in sustaining assessments on state banks to create a guaranty fund to make good deposits in insolvent banks. The acts of Congress relative to the recapture of excess railroad earnings, and the principles upheld as to the division of rates were

likewise cited as illustrative of the broad power of Congress to regulate the national transportation system as a whole. Concluding discussion of these phases, the opinion states:

> This object of adequately maintaining the whole transportation system may be served in more than these two ways. The underlying principle is that Congress has the power to treat the transportation system of the country as a unit for the purpose of regulation in the public interest, so long as particular railroad properties are not subjected to confiscation. In the light of that principle, and of applications which have been held valid, I am unable to see that the establishment of a unitary system of retirement allowances for employees is beyond constitutional authority. Congress was entitled to weigh the advantages of such a system, as against inequalties which it would inevitably produce, and reach a conclusion as to the policy best suited to the needs of the country.

The minority opinion also discussed the validity of the basis on which retirement allowances are computed. While agreeing that it is arbitrary to require the carriers to pay allowances to persons whose employment has terminated and will not be renewed, it was urged that the provision is severable, and that its invalidity would not destroy the whole Act.

As to the inclusion of prior service, in reckoning the amount of the retirement allowance, in the case of those who reenter carrier service, it was argued that such inclusion is not without rational support as a fair basis, and that, accordingly it should be upheld.

In conclusion, the minority opinion adds:

> The power committed to Congress to govern interstate commerce does not require that its government should be wise, much less that it should be perfect. The power implies a broad discretion and thus permits a wide range even of mistakes. Expert discussion of pension plans reveals different views of the manner in which they should be set up, and a close study of advisable methods is in progress. It is not our province to enter that field, and I am not persuaded that Congress in entering it for the purpose of regulating interstate carriers has transcended the limits of the authority which the Constitution confers.

JUSTICES BRANDEIS, STONE and CARDOZO joined in the dissenting opinion.

The case was argued by Assistant Attorney General Stephens and Mr. Harry Shulman for petitioners and by Messrs. Jacob Aronson and Emmett E. McInnis for respondents.

Carriers—Restitution for Charges Made in Excess of Rates Prescribed by state Authority—Principles Governing Equitable Relief

Where a carrier has collected charges under an order of the Interstate Commerce Commission, defective by reason of errors in procedure, and the defects are later remedied, principles of equity do not require a court of equity to afford relief to shippers in the form of restitution for the difference between the charges made under the defective order and under a state rate found by the Commission to have been discriminatory against interstate commerce.

Atlantic Coast Line Railroad Company v. Florida, et al., 79 Adv. Op., 719; 55 Sup. Ct. Rep., 713.

This case involved a suit for restitution from the Atlantic Coast Line Railroad Company, for the difference in freight charges based on rates charged by the carrier under an order of the Interstate Commerce Commission and lower rates which had been voluntarily established previously by the carrier and approved by the Florida Commission. The District Court for Northern Georgia, after referring the case to a master, awarded partial restitution on the basis of a rate lower than the interstate rate but higher than the rate ordered by the State Commission. On cross-appeals, the Supreme Court reversed the decree and directed the dismissal of the claims, in an opinion by MR. JUSTICE CARDOZO. The CHIEF JUSTICE, MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE ROBERTS were of the opinion that restitution should have been allowed for the full amount claimed, based upon the rate established by the state authority.

The rate schedule established by the State Commission was originally set up voluntarily, in 1903, by the carrier for the transportation of logs in train and carload shipments within the State of Florida. It was known as the Cummer rate, and in 1927 it was made the official rate by the State Commission.

In 1926, a complaint was filed by the Public Service Commission of Georgia against the carrier with the Interstate Commerce Commission, attacking the Cummer scale. The Florida Commission and important shippers intervened. The federal Commission, by orders of August 2, 1928, and February 7, 1929, found the Cummer scale (along with other rates) discriminatory against interstate commerce, and established new rates. Florida and certain shippers sued in a federal court to vacate orders establishing the new rates. That court dismissed the bills, but its ruling was reversed by the Supreme Court (282 U. S. 194), on the ground that the report of the Commission failed to set forth the necessary findings. That reversal took place on February 19, 1931.

Between February 8, 1929, and March 7, 1931, the railroad collected rates prescribed by the order of the federal Commission, discarding the Cummer scale. Further, the Florida Commission, yielding to the order of the federal Commission, declared the Cummer scale suspended so long as the decree of the District Court remained unreversed. The federal Commission took new evidence, made new findings and prescribed the same rate it had put into effect before. These rates became effective February 25, 1933. The new order was again attacked, but the Supreme Court sustained the rates. (292 U. S. 1.)

Meanwhile, the suits for restitution were brought, to recover the difference in rates paid from February 8, 1929, to March 7, 1931, under the order of the Commission, and the lower rates which would have been paid upon adherence to the Cummer scale. Since the District Court, on findings of a master, awarded restitution on a basis of rates higher than the Cummer scale but lower than those ordered by the federal Commission, neither side was satisfied, and cross appeals followed.

In reaching the conclusion that equitable relief should be denied, MR. JUSTICE CARDOZO recognized the rule that loss sustained under compulsion of a judgment shall be restored in the event of reversal; but exceptions to the rule were also noted. In this connection the learned Justice said:

> Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. . . . Indeed, the concept of compulsion has been extended to cases where the error of the decree was one of inaction rather than action, as where a court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy. . . . But the rule, even though general in its application, is not without exceptions. A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function.

. . . The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it. . . . The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . . The ruling in *Western Assurance Co. v. Towle, supra* gives point to the distinction. The plaintiff had paid money to the defendant upon a policy of insurance against fire. The payment was procured by false representations and false swearing as to the extent of the loss, which, if seasonably discovered, would have worked a forefeiture of the policy. The court held that in an action for money had and received, the plaintiff could recover "so much only as the amount paid exceeded the actual loss sustained by the insured;" in equity and good conscience the rest might be retained.

Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip." . . . "In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received."

In the light of these equitable principles, the majority of the Court were of the opinion that, since the higher rates had been charged under an order of the federal Commission, which were finally sustained, the court should withhold equitable relief, even though the rates were for a time without basis in law, due to defects in the Commission's procedure. Discussing these features of the case, MR. JUSTICE CARDOZO said:

By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the form of its earlier decision. During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure . . . as the sequel of events has shown them to be. Unjust discrimination against interstate commerce, "forbidden" by the statute, and there "declared to be unlawful," . . . does not lose its unjust quality because the evil is without a remedy until the Commission shall have spoken. The word when it goes forth invested with the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning. The Commission was without power to give reparation for the injustice of the past, but it was not without power to inquire whether injustice had been done and to make report accordingly. Indeed, without such an inquiry and appropriate evidence and findings, its order could not stand, though directed to the years to come. Obedient to this duty, the Commission looked into the past and ascertained the facts. In particular it looked into the very years covered by the claims for restitution and found the inequality and injustice inherent in the Cummer rates during the years they were in suspense and during those they were in force. . . What it had stated in its first report . . . was thus supplemented and confirmed by what it stated in the second. The two sets of findings tell us, when read together, that restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements.

The carrier's position takes on an added equity when the fact is borne in mind that the charges of the Cummer schedule are less than compensatory, and would result in confiscation if enforced by the power of the state after challenge by the carrier in appropriate proceedings. What those proceedings are has been a subject of dispute under the Florida decisions. For many years it was believed that a carrier objecting to a schedule as unreasonably low, might put another into effect without asking the consent of any one, and justify its conduct later if a contest should develop. . . The shippers and the state of Florida contend that by a very recent decision this practice has been ended. . . The present rule is said to be that the carrier must resort in the first place to an administrative remedy before the Railroad Commission of the state, and look to the courts afterwards. If all this be accepted, the conclusion does not follow that the confiscatory character of a schedule is not to be considered in determining the equity of the carrier's possession when higher rates have been collected under color of legal right and consignees or shippers are trying to regain what they have paid. In saying this we do not forget that the Cummer scale of rates was voluntary in origin. Later, by an order of the state commission, it became a scale prescribed by law. Whatever voluntary quality it then retained must be deemed to have departed when the carrier made common cause with the critics of the scale in contesting its validity.

The claim for restitution yields to the impact of these converging equities with all their cumulative power. It would yield to such an impact though the action to which it is an incident were triable in a court of law. . . It must yield more swiftly and surely when the litigants are in a court of equity. . . The right that equity declines to further may have its origin in contract. But also, and in typical instances, it has its origin in statute. . . The tests of conscience and fair dealing will be the same in either case. This District Court whose decree we are reviewing was organized to pass upon the question whether the challenged order of the Commission should be vacated or upheld. . . Whatever power it has to compel restitution by the carrier of items subsequently collected derives from that primary jurisdiction and is ancillary thereto. In the exercise of that power it is not required to lend its aid in perpetuating a forbidden practice. Florida has no equity other than the equities of the consignees and shippers. The consignees and shippers have no equity that can override a prohibition and a policy declared by act of Congress. To prevail, the claimants must make out that in the circumstances here developed a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings. The blunders being now corrected, the verities of the transaction are revealed as they were from the beginning. We think the better view is that in the light of its present knowledge the court will stay its hand and leave the parties where it finds them.

The opinion of the minority was delivered by MR. JUSTICE ROBERTS. In this opinion the history of the controversy was fully reviewed, and the conclusion reached that the scale of rates established by the Florida Commission was the only lawful scale until it was duly changed by a lawful order of the federal Commission. Accordingly it was maintained that restitution should have been allowed on the basis of the charges collected in excess of the Cummer rates. The conclusion reached by the minority appears in the following portions of the opinion:

We are told that restitution is an equitable doctrine and that as the court, upon consideration of all the facts, should hold there was no inequity in the carrier's retaining what it had collected, refusal of a decree is merely to withhold action, as a court of equity is always free to do in such circumstances. But the weakness of this argument is, that by refusing relief the court in effect denies legal rights. It is not suggested that a dismissal of the motion will not be *res judicata* in any action hereafter brought to recover for overcharges; and if so, the decision in this case is an adjudication by a federal court that the collection of the increased rate was lawful, the invalidity of the Commission's order and the law of Florida to the contrary notwithstanding.

* *

The case is not to be decided according to the character ascribed the first order of the Commission. Whether called void or voidable, the order gave the railroad no right to collect the sums exacted. If, as must be conceded, the carrier took, under and by force of that order, money to which it was not in law entitled, the conclusion necessarily follows that it must restore what was so taken.

To hold that the claimants may not have restitution is to say that invalid, void or voidable orders of the Commission have precisely the same force and effect as orders lawfully made, if from extrinsic facts and matters not cognizable by the court the conclusion may be drawn that the Commission might have made a valid order in the circumstances. So to hold is to recognize in a restitution proceedings, a jurisdiction which in no other circumstances and in

no other case could a federal court exercise; and to permit that court to ignore and nullify action in a field within the State's sovereign power.

The case was argued by Messrs. Robert C. Alston and Carl H. Davis for the R. R. Co., by Mr. Henry P. Adair for Brooks-Scanlon Corporation et al. and by Mr. J. V. Norman for Wilson Lumber Co. It was submitted for the State of Florida by Attorney General Cary D. Landis and for the Florida R. R. Commission by Mr. Theo. T. Turnbull.

Bankruptcy—Computation of Referee's Compensation

The provision of the Bankruptcy Act, prescribing the basis on which a referee's compensation is to be computed, is to be construed in the light of the purpose of Congress to eliminate the extravagant costs of administration of bankrupt estates.

In computing a referee's compensation, which is fixed by statute at ½% of the amount to be paid to creditors on a composition, indenture bonds of the bankrupt, which are extended as to time of payment and reduced as to rate of interest and otherwise modified, are not to be treated as cash at the face amount of the bonds, where their market value at the time of the composition was substantially below par.

Realty Associates Securities Corp. et al. v. O'Connor et al., 79 Adv. Op., 746; 55 Sup. Ct. Rep., 663.

This opinion involved a construction of the provision of the Bankruptcy Act fixing the amount of compensation of a referee in bankruptcy upon a composition with the creditors.

Realty Associates Securities Corporation was adjudged a bankrupt on a voluntary petition, and the proceeding was sent to a referee. The chief claims were $12,631,949.67 on bonds issued under indentures. Other claims were $208,133.90, of which one for $207,583.95 is contested and undetermined. Under the terms of a composition, agreed to and confirmed, all creditors were to receive cash for 15% of their claims. Bondholders (after crediting cash) were to extend and otherwise modify the obligation for the remaining 85%. The time for payment was extended, and the rate of interest lowered from 6% to 5%, with interest accruing prior to October, 1943, to be payable only out of earnings, but to be cumulative. The arrangement did not call for surrender of the bonds; but a notation was attached to each bond, evidencing these changes. The required cash was deposited and the necessary instruments were signed and filed.

The statute, regulating the referee's compensation, provides that "Referees shall receive as full compensation for their services . . . one-half of 1 per centum upon the amount to be paid to creditors upon the confirmation of a composition." Bankruptcy Act, § 40 (a). The creditors contended that the percentage was to be computed upon the cash, and nothing else. This would amount of $10,455.65. The referee asserted that he was entitled to a percentage not only on the cash, but also on the face amount of the bonds. On this basis the compensation would be $65,040.19. The District Court adopted an intermediate course, and allowed $24,064.87, based on the market value of the bonds (37%) of par, or 22% when the principal had been reduced by crediting the 15% cash. The creditors acquiesced; but the referee took an appeal. The Circuit Court of Appeals sustained the referee's contention, one judge dissenting. On certiorari the decree of the latter court was reversed, and that of the District Court affirmed.

MR. JUSTICE CARDOZO delivered the opinion of the Court, in which he emphasized that the face amount of the bonds could not rationally be regarded as the equivalent of cash, and that the construction to be placed upon the statutory provision is to be considered in the light of its intended purpose to eliminate the extravagant costs of the administration of bankruptcy estates. As to these matters, and their bearing on the ruling, the learned Justice said:

> We think it an unreasonable view of the meaning of the statute . . . that would treat the bonds of the bankrupt in the situation here developed as equivalent to cash.
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> In determining the effect of any particular composition, a "payment" or an "amount paid" must have a sensible construction, which may vary in one case and another according to the facts. Here, at the date of the bankruptcy, creditors were the owners of the bonds of the bankrupt, its promises, non-negotiable in form, for the payment of money, to the extent of nearly $13,000,000. At the date of the composition and afterwards, they held the same bonds, scaled down in amount as to principal and interest, and with some of the terms varied, but still the same bonds with the promises to pay not fulfilled, nor even accelerated, but on the contrary deferred. Common sense revolts at the suggestion that creditors have been paid for this purpose or for any other when all that has happened is that they have been left in possession of the old promises of the debtor, reduced in amount and extended as to time.
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> Referees in bankruptcy are public officers . . . and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. . . . Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. . . . In response to those complaints, Congress has attempted in the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers. . . . The pay for referees is no longer involved in uncertainty as to the applicable percentage. By mischance there is still uncertainty at times as to the principal amount to which the rate is to be applied. In cases of composition the principal is "the amount to be paid to creditors upon the confirmation," and before we can compute what is due we must know what payment is. The ascertainment of that fact, like the ascertainment of facts generally in the discharge of the judicial function, is a process that must be flexible and broad enough to keep all the circumstances in view. In weighing their significance a court will not forget that Congress meant to hit the evil of extravagance, and that the meaning of its words, if doubtful, must be adapted to its aim. If this is kept in mind, certain inferences will follow. One of them will be that a promise is not payment unless it would naturally be so regarded in the common speech of men, and that the extent of the payment, whether partial or complete, must be subject to a kindred test.
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> Viewing this case from that angle of vision, we hold that the referee had full compensation in the award of commissions that was made by the District Judge. Whether he was entitled to as much, we do not now determine, the creditors and the bankrupt, who were at liberty to oppose, having preferred to acquiesce. For present purposes it is enough that he was not entitled to more. The bonds had a value in the market that would have made it possible for a creditor to convert them into money at 22% of par. If present values were to be estimated, this was the present value of the promise of the debtor as of the date of composition. To find anything in addition would be to capitalize a hope.

The case was argued by Mr. Alfred T. Davison and by Mr. James N. Rosenberg for two petitioners respectively; by Mr. George C. Levin for respondent, Eugene F. O'Connor, Jr., and by Mr. Archibald Palmer for Eliza B. Carman, et al.

Constitutional Law—Due Process—Paving Assessment

Where a statute and city ordinance impose a street paving assessment on a street railway company for payment of the cost of paving the portion of the street be-

tween the railway company's tracks and portions on each side thereof, and the assessment is based on a rebuttable presumption of the existence of benefits to the property owners subject to the assessment, it is a denial of due process to deny to the railway the opportunity to prove that the assessment was confiscatory, in that it exceeded the entire value of the property and that no benefits accrued to it.

Georgia Railway Electric Co. et al. v. Decatur, 79 Adv. Op., 702; 55 Sup. Ct. Rep., 701.

This case involved a question as to the propriety of excluding testimony offered, in a state court, to prove that an assessment imposed on a street railway for street paving was in excess of the railway's property connected with the paving improvement, and that it was confiscatory.

The City of Decatur, Georgia, ordained that a designated street, over which the railway of the Georgia Power Company extended, should be paved; that the cost of the pavement between the tracks and for two feet on each side thereof should be borne by the railway, and that the remaining cost should be assessed equally against abutting real estate on each side of the street.

The railway refused to pay the assessment, and the City brought suit in equity to recover the amount thereof. The railway answered, asserting that the assessment vastly exceeded the entire value of the street-railway property and lines located and operated within the City, and offered to surrender them to the City, together with the franchise; that the only reason why the offer was not accepted was because their entire value was less than the amount of assessment; that the paving for which the assessment was made did not benefit the lines, but, on the contrary, was a detriment.

At the trial, the appellants called a witness to prove these allegations, but the testimony was excluded on the ground that the question of benefits was irrelevant and immaterial. A decree followed, imposing liability for the full amount of the assessment. This ruling was affirmed by the Supreme Court of Georgia. On further appeal, the decree was reversed by the Supreme Court, by divided bench, in an opinion by Mr. Justice Sutherland. In reaching the conclusion that the decree should be reversed, Mr. Justice Sutherland pointed out that the Supreme Court of Georgia has construed the statute as contemplating the existence of benefits to the railway as a basis for the assessment, and as imposing on railway companies the burden of overcoming, by proof, a legislative presumption that benefits exist. In view of this construction of the statute, it was thought that the ruling that the proffered testimony was irrelevant and immaterial constituted the denial of a federal right. As to this MR. JUSTICE SUTHERLAND said:

> Under the statute and ordinance thus construed, if the burden imposed is without any compensating advantage (as appellants offered to show), the arbitrary abuse of the power exercised is plain, . . . the assessment amounts to confiscation. . . . And this doctrine has been fully recognized in Georgia. . . . Moreover, the offer of appellants to surrender all their railway property within the city, including the franchise, strongly tended to show that the assessment exceeded the entire value of the property with which the improvement was connected; in which case, as the court below itself has held, there can be no presumption of benefit. . . .
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> No question is raised as to the competency of the proof which was offered, and evidently there is none. The ruling was simply that it was immaterial. But the existence of benefits resulting from the improvement was material and was deemed so—else why require it, or why create an affirmative presumption in respect of it? Certainly, competent proof tending to overcome a rebuttable presumption of a material fact cannot be immaterial; and the refusal of a court to receive or consider any proof whatever on the subject amounts to a denial of a hearing on that issue, in contravention of the due process of law clause of the Constitution. . . .

MR. JUSTICE STONE delivered an opinion, concurred in by MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO, to the effect that the decree should be affirmed. In support of this view, it was urged that since the paving requirement could be imposed under the police power, the mere fact that the state court justified the requirement on different or even untenable grounds would not present a substantial federal question.

It was urged further that the record made it plain that the question considered by the Court was unsubstantial. In this connection it was pointed out that the appellant has a single franchise to supply electric power and to operate a car line; the latter operation being under a contract to maintain a five cent fare. Consequently, the railways were thought to be powerless, without the city's consent, to surrender the car line and retain the profitable business of supplying electric current. In elaboration of this point, and denying that the offered proof would tend to overcome the legislative finding of benefit, MR. JUSTICE STONE said:

> Our decisions make it abundantly plain that this evidence, if received, could have no tendency to overcome the presumptive correctness of the legislative finding of benefit. A property owner does not establish want of assessable benefits by showing that a particular public improvement does not aid or facilitate the particular use which he makes of the land. . . . or demonstrate that the assessment is confiscatory by showing that the use which he makes of the land is unprofitable. . . . The earning capacity of the property would seem especially irrelevant where the profit has been limited by the taxpayer's contract, whether entered into improvidently or to gain some collateral advantage.
>
> The offer to surrender the unprofitable street railway, while retaining the profitable electric business, which in this case the Supreme Court of the State ruled were parts of an indivisible franchise, was rightly disregarded as without probative force. The Power Company could not, without the consent of the city, surrender the unprofitable part of its franchise and retain the profitable part. . . . The city could not accept the offer without abrogating its contract. Neither the offer nor the refusal to accept it is evidence that the improvement was not of public benefit, which inured to the appellant as a property owner.
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> A street must be properly paved, for the safety and convenience of travelers, as well as for the good of abutting owners. A resolution of the city authorities that a new pavement has become necessary, and assessing the cost according to an estimate of benefits, is not to be undone because the railway is of the opinion that for the operation of its business the old pavement is good enough.

The case was argued by Mr. Walter T. Colquitt for the appellants, and by Mr. James A. Branch for the appellee.

LEGISLATION AND MUNICIPAL DEBT

Amendment to Bankruptcy Act Designed to Provide a Method of Simplifying Settlement of Debts of Heavily Overburdened Municipalities—What Several State Legislatures Have Done to Meet Problem Created by Financial Difficulties of These Bodies—Connecticut's Drastic Provision for Receivership of a Community under Certain Conditions, etc.

By Eugene J. Ackerson and Joseph P. Chamberlain

LEGISLATION under the bankruptcy provision of the Constitution, which it was hoped would make easier the adjustment of private debts, particularly those of railroads, corporations and the farmers, had been a result of the difficulties of debtors who entered into obligations in the prosperous twenties which they find it hard to meet in days of depression. This legislation had its effect in persuading Congress to try its hand at finding some method of making simpler the settlement of the debts of those heavily burdened municipalities which found unsatisfactory the existing procedure for effecting a compromise arrangement with their creditors. The bill which finally passed followed precedent by adding a new chapter to the Bankruptcy Act,[1] although the procedure and the results of court action under the act vary substantially from that of the normal bankruptcy action involving private interests.

"The controlling purpose of the bill is to provide a forum where distressed cities, counties, and minor political subdivisions, designated in the bill as 'taxing districts,' of their own volition, free from all coercion, may meet with their creditors under the necessary judicial control and assistance in an effort to effect an adjustment of their financial matters upon a plan deemed mutually advantageous. If a plan is agreed upon by the taxing district and its creditors holding two-thirds in amount of the claims of each class of indebtedness, and if the court is satisfied that the plan is workable and equitable, it may confirm the plan, and the minority creditors are bound thereby.

"The general plan of this bill, as may be seen from the foregoing, is substantially that of the bills amendatory of the Bankruptcy Act dealing with railroads and dealing with corporations, which have been approved by the House."[2]

The bill became Public No. 251,[3] adding a new chapter (IX) to the Bankruptcy Act. It declares the existence of a national emergency caused by the increasing financial difficulties of many local governmental units and confers, until May 24, 1936, on courts of bankruptcy, jurisdiction of proceedings for the relief of municipal debtors (municipalities and political subdivisions). Like the recent amendments contained in the Bankruptcy Act, it provides for the adjustment of the interests of creditors, bases jurisdiction on inability to pay debts as they mature, provides for a readjustment of debts instead of a liquidation of assets, and for a discharge from debts and liabilities, but without an adjudication of bankruptcy.[4]

The procedure prescribed in Chapter IX is similar to that in the corporate reorganization amendment. Any municipality or other political subdivision of a State (referred to as a "taxing district" in the chapter) may apply to the Federal district court for the benefits of the chapter. A plan of readjustment of the debts of the taxing district must be presented, which must include provisions modifying or altering the rights of creditors of the municipality, secured or unsecured, either through the issuance of new securities or otherwise. The petition of the taxing district must state that the creditors owning 30 per cent in case of drainage, irrigation, reclamation and levee districts, and 51 per cent in case of other districts, of the debt of the taxing district, have accepted the plan in writing. If a State agency has been appointed to take over the fiscal affairs of a taxing district, it also must approve the petition and the plan. Only the taxing district may petition, however, so that the proceeding is in the nature of a voluntary bankruptcy. On the filing of the petition, the judge may approve it if he is satisfied that it complies with the act and was filed in good faith, but if not he must dismiss it. If creditors holding five per cent of the indebtedness covered by the plan appear within 90 days after publication of notice, and controvert facts stated in the petition, the judge must decide the issues and, unless the material allegations of the petition are sustained, dismiss the petition. Only creditors affected materially and adversely shall be deemed affected, and in case of controversy as to whether a creditor is affected, the judge shall decide the issue after notice and hearing of the parties interested. The court may on notice enjoin or stay until after final decree, "the commencement or continuation of suits against the taxing district, or any officer or inhabitant of the taxing district, on account of the indebtedness of such taxing district, or to enforce any lien or to enforce levy of taxes for the payment of any such indebtedness." The judge has the alternative, however, of entering an interlocutory decree making the plan temporarily operative in respect to the indebtedness which it covers. If such a decree is entered, then payment of principal and interest on the debt is postponed during the period during which the decree remains in force, except as provided in the plan.

The plan shall not be confirmed until it has been accepted in writing by creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan, and three-fourths in amount of the claims of all classes, except that in case of drainage, irrigation, reclamation, and levee districts, two-thirds in amount of all claims will suffice. The judge,

1. 29 Stat. 544.
2. House of Representatives Report No. 207, 73rd Cong., 1st Sess., p. 1.
3. 48 Stat. 798.
4. Questions of policy and constitutionality of the bill (H. R. 5950) were discussed in XIX *Amer. Bar Assoc. Jour.*, p. 637, (November, 1933).

after hearing objections, shall confirm the plan if it meets the requirements set forth in the act. Upon confirmation the plan and the order of confirmation are binding upon the taxing district and upon all of its creditors. The final decree discharges the taxing district from the debts and liabilities dealt with in the plan except as provided therein, and upon entry thereof, the jurisdiction of the court ceases.

The chapter applies to taxing districts and their creditors, whether the debts were incurred or the interest of the creditor acquired, prior to or after the date of approval of the Act. There is a blanket provision that the jurisdiction and powers of the court, the duties of the taxing district, and the rights and liabilities of creditors, and of all persons with respect to the taxing district and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication entered on the day the petition for the taxing district was approved. A provision of the act directs the court in proceedings under the chapter not to interfere with any of the political or governmental powers of the taxing district, or any of the property or revenues thereof necessary for essential governmental purposes, or any income-producing property, unless the plan of readjustment so provides. Nothing in it is to be construed to limit or impair the power of any State to control any of its political subdivisions in the exercise of its political or governmental powers, including the power to require an approval by some State governmental agency for the filing of any petition or plan of readjustment under the chapter, and in case any such agency is authorized by law to exercise control, and has assumed control over the financial affairs of any political subdivision, no petition may be received from that subdivision, and no plan shall be put into effect, unless approved by the agency. These and other provisions of the chapter are intended to insure the voluntary nature of the proceedings on the part of the taxing district, and the acquiescence or concurrence of the State in allowing such action to be taken by the district, to draw a distinction between governmental and proprietary capacities, and to disclaim any desire on the part of the Federal Government to encroach on the rights and responsibilities of the States. They reflect the desire of the Judiciary Committees to meet legal objections to the attempt to extend bankruptcy legislation to operate upon the debts of a political and governmental unit, deriving its existence and powers from a State.

During the discussion in committee the constitutionality of the bill was questioned and the committee requested the Attorney General to give them his opinion. He reported that the bill would be constitutional if it were evident that action could be taken by a municipality only with the consent of the State through legislation. The minority in both House and Senate strongly questioned both the constitutionality and the policy of the bill. They did not agree with the Attorney General and maintained that "either Congress alone has the power to subject municipal corporations to the jurisdiction of the United States courts of bankruptcy or else the power does not exist."[5] They felt that the political subdivisions of the State were closely bound up with its governmental power and that Congress could not, in the guise of a bankruptcy law, interfere with the governmental powers of a State. They felt that the legislation would decrease confidence in municipal bonds, and therefore, in the long run, injure the credit of all municipalities, even including those which in the present plight would be aided by the act.

The doubts of the minorities of the committees have found expression in a case which came up in a Federal district court. The judge held that Congress could not confer on a Federal court the jurisdiction to readjust bonds issued by an agency of a sovereign state in an action brought by a water improvement district, which the court held was engaged in a public business.[6]

Several of the State legislatures have concerned themselves with ways of meeting the financial difficulties of their municipalities. In 1931,[7] New Jersey authorized procedure through the Supreme Court. The holder of notes or bonds of a municipal corporation is authorized to file a verified petition declaring that the municipality had defaulted in the payment of principal or interest on its obligations. The justice is then directed to make a summary investigation, and if he is satisfied that the municipality is in default, to make an order to that effect. When the order is filed the governing body of a municipality may pass a resolution reciting that it is not in a position to meet its notes and bonds promptly, and asking that the municipal finance commission, consisting of the attorney general, the state tax commissioner and the commissioner of municipal accounts, should begin to function. The commission then is authorized to certify to the governing body of the municipality resolutions providing for funding of its indebtedness which must be adopted by the municipal government before they can take effect. The statute provides that the indebtedness created under its terms is not subject to the limitations of any other act, thus giving an inducement to a municipality to adopt the funding plan proposed. While the commission functions, the municipal government may not issue notes or bonds except in anticipation of taxes for the current year, and the total of its annual expenditure is limited. These restrictions on the local authorities are sanctioned by the right of the commission to approve appropriations. A substantial power of the commission is that of requiring a reassessment of the taxable property in the municipality. The commission continues to function until the indebtedness of the municipality has been paid or refunded, and thereafter the state commissioner of municipal accounts may continue to exercise the powers of the commission to assent to the issuance of bonds until the debt of the municipality is within statutory limits.

Oregon[8] also authorizes through the courts a control over municipalities which have defaulted in payment of interest or principal on their obligations. As in New Jersey, action is initiated by creditors. The owners of not less than 25% in value of the defaulted obligations may file a petition in the county court and ask for the appointment of a municipal administrator. If the corporation consents, the court after a hearing may appoint the administrator, if it finds that the allegations in the

5. H. R. Rep. p. 5, cited note 2.

6. In Re *Cameron County Water Improvement District No. 1*, 9 Fed. Supp. 108 (1934).

7. Chap. 340.

8. Laws of 1933, Chap. 433.

petition are true and that the facts justify the appointment. An administrator cannot be appointed by collusion between the creditors and the local government, since it is the court which has the responsibility of making the appointment after the hearings, of which notice must be given and at which voters or taxpayers may appear. The administrator may be removed by the court for cause and acts under its supervision. His authority is wide, since he has control of the fiscal affairs of the municipality, but he cannot carry through refunding or liquidating operations without the consent of the court and of the governing body of the municipality. He has, however, a control over the operative budget, and tax levies for the payment of obligations must be approved by him. Before authorizing funding operations, he must require not less than 80 per cent of the known holders of the obligations to be funded to agree in writing to accept the plan. To get around the difficulty of locating holders of the bonds, the Oregon legislature made provision for publication and declared that unknown holders must be deemed to have consented if they do not file dissent within 90 days of publication of notice. The laws limiting the debt of municipalities do not apply to the securities issued by refunding operations under this act. The court may discharge the administrator on his showing that the debt of the municipality has been settled and that the conduct of its fiscal affairs should be revested in its governing body.

Connecticut[9] has a drastic provision for the receivership of a municipality which, with the approval of the state emergency relief commission, has issued serial bonds for relief purposes. In case of default on such bonds, the commission may apply to the superior court for the appointment of a receiver to have full control of the financial affairs of the municipality, so that it may not expend money or incur an obligation without his written approval. He may, with the commission's approval, issue bonds or notes to pay or refund maturing obligations and liquidate defaults. With the consent of the commission, he may compromise disputed claims against the municipality, and may sue or be sued in its name. Furthermore, with the commission's approval, he may act as local tax collector. The court may terminate the receivership on application of the commission when the last outstanding bond or note issued by the municipality or receiver is paid or discharged or money set aside for its payment, or when the court deems that the credit of the municipality has been restored and danger of default no longer exists.

Nothing has been done under either the Oregon or the Connecticut statute, but a different situation exists in Massachusetts where three special laws have been passed to give to state commissions the control of the finances of three municipalities, including the City of Fall River.[10] The Fall River act authorized a bond issue in excess of the statutory limit to take care of temporary loans of the city and certain other obligations, in particular the satisfaction of abatements on account of tax assessments and of refunds on account of taxes paid. The authority was also given to extend a fixed amount of revenue loans. A sort of receivership was created under a board of finance of three members appointed by the governor for overlapping six-year terms. The governor may remove any member and fill vacancies. The board has supervision over the financial affairs of the city. No appropriations may be made and no debt incurred without their approval in writing. No department of the city can expend money or incur liability except with their written approval, thus giving them a wide control over the city's budget. The powers of the board will terminate after the payment of the bonds issued under the act or the provision of a sum sufficient to meet them.

The other acts relate to small communities, but go far in granting to state appointed authorities wide power over the finances of the communities affected.[11]

Virginia deals severely with a defaulting county. Chapter 148 of the Laws of 1932 authorizes the holder of notes or bonds of any county to file with the governor a petition stating that the county has defaulted in payment of principal and interest on the notes or bonds which he owns, whereupon the governor shall make a summary investigation of facts declared in the petition, and if he finds them true, must issue an order to the controller to withhold payments to the county of state funds, except school funds, until the default is paid. He may even direct the payment of the sums withheld to the petition to cover the default.

In 1933, both Montana and Florida[12] authorized their municipalities to take action under any federal statute permitting municipal bankruptcy procedure or any similar action. Montana went further and authorized refunding of municipal obligations without regard to statutory limitations on their debts. The municipal authorities must present their plan to the state examiner, and it can go into effect only with his approval. Bonds issued under the plan can only be used to retire existing indebtedness, either through exchange for outstanding bonds, or their purchase with the proceeds from the sale of the new obligations.

9. 1933 Supplement to General Statutes, Chap. 32-a, Part II.
10. Acts and Resolves 1931, Chap. 44.
11. Acts and Resolves, 1932, Chap. 223, Town of Mashpee; 1933, Chap. 341, Town of Millville.
12. Florida General Acts and Resolutions, 1933, Chap. 15878; Montana Laws and Resolutions, Extra Session 1933, Chap. 6.

The Association's Special Train

The trip planned for members going to Los Angeles has met with general approval and as the June Journal goes to press, reservations have been made for approximately one hundred and sixty persons, some of whom will leave the party at Los Angeles, while others will make the complete tour.

Final arrangements for the many sight-seeing features of the trip, hotel accommodations, and the preparation of passenger lists for the convenience of the members of the party, must be made before departure from Chicago, and all members of the Association interested in traveling on the special train are, therefore, urged to make prompt request for reservations. Complete itinerary and rates will be sent on request addressed to the American Bar Association, 1140 North Dearborn Street, Chicago.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

ULYSSES S. GRANT: The Great Soldier of America. By Robert R. McCormick. 1934. New York; D. Appleton-Century Company. Pp. XVIII, 343. He who attempts biography on the grand scale should know life. He who attempts military history should possess experience in arms. The author of the present work meets both requirements. He satisfies the dictum of Polybius that he who writes of great events should have mingled in events of equal magnitude.

Not only has Colonel McCormick a prerequisite experience in law, journalism, and arms, but from wide reading he enriches his work with a broad background of military history and biography. Grant is not the only general he has studied. When he ventures a comparison, it is as one having authority. The reader's confidence is quickly won and his interest is sustained at a high level even as to matters which few civilians comprehend.

Ulysses S. Grant is not a biography in the full sense, for both the opening and the closing chapters of the subject's life are here omitted. The period prior to the Civil War is compressed into a few sentences, save for a fairly comprehensive study of the part Grant played in the War with Mexico, a part which strikingly foreshadowed subsequent events. Correspondingly, the General's career here terminates with Appomattox, with no attempt to justify or to condemn the anticlimax of the Presidency.

Striking boldly into the four years which made Grant *The Great Soldier of America*, the author finds him personally brave. Too many of his associates in the conflict failed at just this point. They could drill and manoeuvre, they could even march, but they could not force the attack or hold their own against adverse contingencies. But Grant is more than brave. He is the great strategist who outthinks the enemy, not merely the dogged mathematician who utilizes superiority in manpower to conquer by attrition. Proof is afforded from Fort Henry and Fort Donelson through Shiloh, Corinth, and Vicksburg to the Wilderness, the siege of Richmond, and the conclusion of the struggle, that Grant could assume the initiative and maintain it against all discouragement.

With no apparent desire to belittle Grant's associates, the author depicts them as a sorry lot. Halleck, Buell, Burnside, Thomas, Meade, and even Sherman fall far below his stature. Sheridan alone upon the Union side, with Logan as a possible addition, attains true greatness, and even Sheridan stood upon the brink of failure at a major crisis. Among civilians, Stanton and even Lincoln loom none too high. Grant alone emerges as America's Great Soldier, great in military talent, great likewise in character, as his magnanimous acceptance of personal criticism from his chief-of-staff, an ardent prohibitionist, bears witness.

To exemplify the author's method exceeds the bounds of this review. Suffice it that to great lucidity in language is superadded the higher lucidity of maps, which are distributed prodigally throughout, and supplement the text amazingly. *Ulysses S. Grant* is a great book. As literary man and man of arms, Colonel McCormick has done a splendid work.

LOUIS MARTIN SEARS.

Purdue University.

Occasionally books appear that deal with no phase of the law and yet have a special interest for lawyers. This is true of *Opinions: Literary and Otherwise*, by Henry W. Taft (The Macmillan Company: New York.) and *The Lawyers Last Note Book*, by an anonymous English Solicitor (Martin Secker: London.) In them an American and an English lawyer voice their respective reactions to the spectacle of modern life. The point of view of each is that which results from a long life devoted to the successful practice of law. The Englishman as in his earlier volumes *(A Lawyer's Notebook*, and *More from a Lawyer's Notebook)* gives his views as informal jottings in a notebook. The medium of Mr. Taft is the urbane and polished essay. Their conclusions, however, are strikingly similar. Although by no means oblivious to the sometimes disturbing contemporary surface manifestations, each points out the necessity of steering by the ancient landmarks.

The lawyer who is interested in the lighter side of his profession will forfeit a delightful evening's entertainment if he fails to read *Legends of Virginia Lawyers*, by John H. Gwathmey (The Dietz Printing Co., Richmond). A few of the stories are recognizable as having been told for generations both about lawyers in England and in the various sections of this country. Most, however, are new and manifestly indigenous to Virginia. All are interesting and amusing.

A more serious book is the second volume of the biography of Lord Birkenhead *(Frederick Edwin, Earl of Birkenhead: The Last Phase*, by His Son, the Earl of Birkenhead. Thornton Butterworth Ltd., London). The first volume (reviewed in the *Journal*, November, 1933) covered Birkenhead's career as a barrister and brought the story of his life down to the beginning of the World War. For the American lawyer the interest in the present volume—though not comparable to that of the first—lies in the fact that it covers the period when he was Attorney General and Lord Chancellor, and tells of his two American visits. Nor can it be neglected by those who are merely interested in Birkenhead as an advocate, for it con-

tains the most spectacular incident of his forensic career—his conduct of the trial of Sir Roger Casement, in which he led for the Crown.

The most remarkable thing about Birkenhead was the fact that, though he was an ardent and sometimes unrestrained advocate and an intransigent in politics, he was greatly sobered by the responsibilities of the Lord Chancellorship and in that office made a notable contribution both as judge and law reformer. It is to be regretted that his incumbency was all too brief and that, because of his reluctance to undergo the drudgery entailed, he declined to accept the office when it was a second time tendered him.

Lord Birkenhead's son has written a competent, if uninspired, biography, and has displayed as much detachment as could have been expected. It is surprising, however, that he has omitted all mention of the American Bar Association London meeting. Birkenhead was largely responsible for this visit and his efforts were a real service to Anglo-American friendship. It may also be doubted whether Birkenhead's American hosts were as ignorant and uncultured as his son would have us believe.

WALTER P. ARMSTRONG.

Memphis, Tennessee.

Klagbarkeit, Prozessanspruch und Beweis im Licht des Internationalen Rechts: Zugleich ein Beitrag zur Lehre von der Qualifikation. By Dr. Magdalene Schoch. 1934. Leipzig: Bernhard Tauchnitz. Pp. 160. This monograph by a member of the faculty of law of the University of Hamburg has for its title "Actionability, Procedural Rights and Proof in the Light of International Law," "Being Also a Contribution to the Theory of Qualifications." The work purports to deal with the problem of "substance" and "procedure" in the Conflict of Laws. Since the early days in the Conflict of Laws matters of procedure have been determined everywhere by the lex fori. Much confusion exists, however, regarding the exact place where the line is to be drawn between "procedure" and "substantive" rights. The problem is of great practical importance, for the decision in a case may be greatly affected by the classification. On the continent the answer to the problem determines at the same time whether the matter belongs to Conflict of Laws proper (generally called Private International Law) or forms a part of International Civil Procedure, Private International Law being deemed to concern itself only with substantive rights.

Continental jurists writing on the Conflict of Laws generally look for universal postulates, principles, or rules in order that the legal rights arising out of a given situation having contact with different countries may be the same everywhere. They realized from the beginning, of course, that uniformity of decision could not be attained in so far as the controversy involved "procedure." In more recent times they have been shocked to discover that even as to substantive rights their ideal was rendered illusory, by reason of differences in the municipal law regarding the qualification of legal provisions. Granted the same Conflicts rule, different results would follow if a particular matter is regarded in one country as relating to "capacity" and in another as relating to "formalities," if it is regarded in one country as belonging to the law of contracts and in another as to the law of property, if it is regarded in one country as relating to matrimonial property and in another as to the law of succession. This is known as the problem of qualifications.

The author devotes a large portion of her book—one-fourth to be specific—to this problem of qualifications, although it has only an indirect bearing upon the main subject. She concludes that the line to be drawn between "substance" and "procedure" in international situations presents a problem of "primary qualifications," which must be resolved in accordance with the lex fori. This is no doubt the only practicable solution. The question remains, however, what matters should be regarded by the law of the forum as belonging to "procedure." The author points to Anglo-American and to French law as occupying two extreme positions, the one giving to the term a very wide meaning and the other as giving to it a very narrow scope. She calls attention also to the fact that the place where a particular provision may be found—whether it be in the Civil Code or in the Code of Civil Procedure—does not furnish a true index as to its character. Her conclusion appears to be based upon the assumption that the line between "substance" and "procedure" is something having objective reality and thus must be the same for all purposes. Much of her discussion relates therefore to what is "procedural" from a non-Conflicts point of view. Her criterion for the determination whether a particular matter is "substantive" or "procedural" appears to be whether or not it is connected with the "process structure." She seems to think that it follows as a logical deduction that the Statute of Frauds and the burden of proof are procedural. Obviously, however, the criterion used cannot serve as a practical guide in the solution of the problem. Of course, the fact is, that no line can be found between "substance" and "procedure" by analysis but must be drawn arbitrarily with reference to the purpose in view. The mere fact that a particular matter is regarded by the law of the forum as "procedural" for some purposes does not prove that it should be so regarded also in the Conflict of Laws. Matters of right and procedure are frequently so closely interwoven that to apply the former without the latter is impossible without defeating the purpose of the Conflict rules which call for the application of foreign law. It would seem, therefore, that whenever a failure to apply a foreign provision is likely to affect the result in a given situation the law of the forum should seek to include it within the category of "substantive" rights. Any other course can be justified only to the extent that the application of a foreign provision would seriously interfere with the operation of the legal machinery of the forum. Assuredly no such justification exists in the case of the Statute of Frauds or the burden of proof.

The author shows considerable familiarity with the English law but alludes only occasionally to American law. Her failure to consult the American literature more fully on the subject under discussion was unfortunate, as the realistic approach to the Conflict of Laws to be found in this country and especially Professor Cook's illuminating article on the subject of "Substance" and "Procedure" in the Conflict of Laws (42 Yale L. J. 333) would have proved a wholesome antidote to continental conceptualism.

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The Popular Practice of Fraud. By T. Swann Harding. 1935. New York: Longmans Green & Co. Pp. 376. Mr. Harding is a prolific writer in the field concerned in this volume—namely, the exploitation to the public of drugs, foods, cosmetics and similar substances. His volume is hastily thrown together, presumably collected from his contributions to various periodicals. The book has no index, which is unfortunate for the reader, who will find as he goes through the book innumerable repetitions of the same material and the same thought.

Mr. Harding is an employee of the Food and Drugs Administration in Washington but, of course, he writes as an individual. Nevertheless, it is interesting to find that he criticizes the American Medical Association severely for certain exposés and for accepting certain advertising, and he fails to criticize the Food and Drug Administration on which naturally the responsibility rests.

Much of this book is devoted to an attack on the book by Kallet and Schlink called "100,000,000 Guinea Pigs." The attack is merited to the extent that that work discusses medical and biological problems from a purely chemical point of view. However, both the latter book and the present volume are largely composed of material taken from columns of The Journal of the American Medical Association covering investigations made, paid for, and published by the Association and it is sad to see authors availing themselves for their personal benefit of this material and yet damning the source from which they obtained it.

There is much in this volume that will be of interest to every reader who is concerned with similar attempts by the federal and state governments to control exaggerated and fraudulent and misleading advertising.

Unfortunately Mr. Harding has developed a point of view and style of writing which make it difficult if not impossible for him to discuss the subject in a calm and dispassionate manner.

The medical profession needs no defense as to its contribution to the public benefit in relationship to the sale of foods, drugs and cosmetics. It is sad, however, to see it attacked in connection with its work by writers who have not even a clear understanding of the significance of the work or of the scientific basis underlying the discussions.

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Leading Articles in Current Legal Periodicals

Columbia Law Review, March (New York City)—Unconstitutional Conditions and Constitutional Rights, by Robert L. Hale; Foreign Moneys in Domestic Courts, by Osmond K. Fraenkel.

Columbia Law Review, April (New York City)—Holmes, by Karl N. Llewellyn; Collective Labor Agreements under Administrative Regulation of Employment, by Ralph F. Fuchs; The Interpretation of Statutes in the Light of Their Policy by the English Courts, by D. J. Llewellyn Davies; A Redefinition of Basic Legal Terms, by George W. Goble.

Harvard Law Review, April (Cambridge, Mass.)—Newspapers and Contempt of Court in English Law, by Arthur L. Goodhart; The Administration of Intangibles in View of First National Bank v. Maine, by John G. Buchanan, Elmer E. Myers; The NIRA from the Employers' Viewpoint, by Cornelius W. Wickersham.

Harvard Law Review, May (Cambridge, Mass.)—The Gold Clause in United States Bonds, by Henry M. Hart, Jr.; Reorganization Through Bankruptcy: A Remedy for What? by E. Merrick Dodd, Jr.; Hearsay and Non-Hearsay, by Edmund M. Morgan.

Tulane Law Review, April (New Orleans, La.)—Business Monopolies: Three European Systems in their Bearing on American Law, by John Wolff; The Proposed Uniform Bank Collections Act and Possibility of Recodification of the Law on Negotiable Instruments, by Frederick K. Beutel; The Judicial Status of Non-Registered Foreign Corporations in Ecuador, by V. E. Greaves.

Brooklyn Law Review, March (Brooklyn, N. Y.)—Jurisdiction of the Court in Proceedings Under Section 77B, by John Gerdes; The Effect of Section 77B on Real Estate Reorganizations, by Walter J. Fried.

Yale Law Journal, April (New Haven, Conn.)—Conflicting Ideals for Reorganization, by Roger S. Foster; Restraints upon the Alienation of Legal Interests: I, by Merrill I. Schnebly; German Rearmament and United States Treaty Rights, by Edmund W. Pavenstedt.

St. John's Law Review, May (Brooklyn, N. Y.)—The Law of Extradition—A Late Phase, by Louis S. Posner; Revitalizing Rate Regulation, by Pincus Berkson.

Washington Law Review, April (Seattle, Wash.)—The Limits of Congressional Investigating Power, by Jack Gose; Intent to Deceive in Applications for Insurance Policies, by Leo D. Bloch.

Temple Law Quarterly, April (Philadelphia, Pa.)—A Graduated Income Tax and the Pennsylvania Constitution, by J. Warren Brock; Lincoln the Lawyer, by Francis Chapman; The Restatement of Contracts, by Samuel Williston; Conditional Wills, by Allen M. Stearne.

American Journal of International Law, April (Washington, D. C.)—Belligerent Aircraft, Neutral Trade, and Unpreparedness, by Charles Warren; The Position of Aliens in National Socialist Penal Law Reform, by Lawrence Preuss; Implied Resolutive Conditions in Treaties, by Charles Fairman; Extraterritorial Jurisdiction in the Ancient World, by Shalom Kassan; A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality, by Durward V. Sandifer.

Mississippi Law Journal, April (University, Miss.)—International Law in the Supreme Court of the United States, by James J. Lenoir; The Constitution of the United States, by J. Morgan Stevens; A Re-Examination of our Legal Rights, by Wex S. Malone; Municipal Property Beyond the Corporate Limits and not for Municipal Purposes, Acquired Through Criminal Court Action, by William Hemingway; Radical Disfranchisement in Mississippi (1867-70) by William A. Russ, Jr.; Young Lawyer, Now What? by Louis Cochran; The One, or more than One-Count Declaration in the Field of Torts, by Floyd W. Cunningham; Military Law and Procedure from the Viewpoint of a Mississippi Lawyer, by Abe D. Somerville; The Unconstitutionality of the Anti-Duelling Act of Mississippi, by J. B. Hutton, Jr.

Commercial Law Journal, May (Chicago)—Roger Brooke Taney, by John A. Livingstone; The Forgotten Stockholder, by J. Hugo Grimm; Judicial Reconstruction, by Fletcher Riley; In Behalf of Lawyers, by Eldridge Hart.

California Law Review, May (Berkeley, Cal.)—The Conflict of Laws and Workmen's Compensation, by David C. Dunlap; Protection of Customer Lists in California, by Bauer Edwin Kramer.

Illinois Law Review, May (Chicago)—Relational Interests, by Leon Green; Indorsements after Maturity and the "New Bill" Doctrine, by Joseph M. Cormack and Bruce Browne; A Plan for Facilitating Constitutional Amendment in Illinois, by Alden L. Powell.

Minnesota Law Review, May (Minneapolis, Minn.)—The Basis for Liability for Defamation by Radio, by Lawrence Vold.

Canadian Bar Review, April (Ottawa, Ont.)—Problems in Conflict of Laws Relating to Automobiles, by B. V. Richardson; Prohibition of Fideicommissum in French and Italian Law, by Salvatore Galgano; The Trial and Execution of Sir Walter Raleigh, by C. F. Davie; Clausula Rebus Sic Stantibus in International Law, by K. R. R. Sastry.

University of Pennsylvania Law Review, May (Philadelphia, Pa.)—The Defaulting Employe—Britton v. Turner Reviewed, by Herbert D. Laube; Corporations Amenable to Section 77B, by Jacob I. Weinstein; The Pennsylvania Personal Property Tax, by Joseph S. Clark, Jr.

Law Notes, May (Northport, N. Y.)—Trustees and Falling Markets, by Ralph Straub; Chance and Quotient Verdicts, by Carl V. Venters.

WHAT ABOUT ADMINISTRATIVE TRIBUNALS?

Bar Not to Be Blamed for Tremendous Advance in Removing Judicial Matters from the Courts—The Matter Goes to the Never Ending Contest for Power by Legislative and Executive Departments in Their Attempt to Avoid Judicial Control—Interpretation of Certain Provisions by the Supreme Court—What the Legislature Should Be Brought to Understand

By Frank B. Fox
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MR. ROBERT H. JACKSON in his article "The Bar and the New Deal" (February issue) quotes a report of a Committee of this Association which demanded that "the decision of controversies of a judicial character must be brought back into the judicial system."

This quotation is coupled with the thought that the Association has "ignored for years the rise of the administrative tribunals." There immediately follows the statement that "Of course an alert bar would have made such reforms that the decision of such controversies would not have gone out of the judicial system."

Is there any real support for these assumptions? Quite regardless of the American Bar Association, lawyers engaged in Federal practice were keenly interested in the Federal Trade Commission Act from the date of its passage in 1914. An alert Bar has lent its assistance to reforms in procedure in practically every state in the Union, and in the Federal Courts.

It is difficult to understand why the Bar should be blamed for the tremendous advance in removing judicial matters from the Courts and submitting them to administrative tribunals. Lawyers could not stop that trend. The legislatures could have stopped it, but they did not want to. The Executive not only proposed, but supported, the transfer of jurisdiction. It was left to the Courts to bar or curtail this tendency, and particularly to the Supreme Court of the United States.

The matter goes deeper than lawyers or their Associations. It goes to the never ending contest for power by the Legislative and Executive Departments in their attempt to avoid Judicial control.

If we confine ourselves only to the Federal statutes, we start with the Federal Trade Commission. Repeatedly the Circuit Courts of Appeal sought to limit the power and jurisdiction of that Commission. Repeatedly the Supreme Court conferred broader and broader powers upon that Commission and refused to permit the decisions of a judicial character to "be brought back into the judicial system."

The trouble is not with administrative tribunals; the trouble lies in the breadth of power given to such tribunals. And the trouble also lies in creating an administrative tribunal which is complaining witness, *ex parte* prosecutor, grand jury, *inter partes* prosecutor, jury and Judge to issue an order affecting the conduct of a citizen's business. If it is provided that the Courts can effectively review the orders of such a hydra-headed tribunal, the final decision is brought back into the judicial system. When, however, the statute, or the Supreme Court, makes the decisions of the administrative tribunal effectively final, the jurisdiction of the Courts is gone.

The Federal Trade Commission Act provided that "The findings of the commission as to facts, if supported by testimony, shall be conclusive." (Sec. 5, 38 Stat. 719; 15 U. S. C. A. Sec. 45, p. 255.) The use of the word "testimony," rather than the broader word "evidence," confirmed the initial belief of Bench and Bar that the Commission was merely a fact-finding commission which would report to the Court on the Petition of the Respondent, leaving the Court to determine all questions of law, all opinion evidence, all findings going to jurisdiction and all inferences or conclusions drawn from the facts. The vice of the Act, however, lay in leaving open to construction the words "conclusive" if "supported by testimony."

The like words are used throughout the creation of Commissions and Authorities of the New Deal usually substituting "evidence" in the place of "testimony." The "findings" may be made "conclusive" without special reference to "facts." In the Radio Commission Act it was provided that the findings of fact should be conclusive "if supported by substantial evidence" unless "it shall clearly appear" that they are "arbitrary or capricious." (46 Stat. 844; 47 U. S. C. 96; Radio Commission v. Nelson Brothers Co., 289 U. S. 266, 276.)

The interpretation of these provisions by the Supreme Court of the United States has been such that there is left a limited review by the Courts only as to the "jurisdiction" of the Commission. That is a meagre right. It is a poor Commission that cannot find in its record the facts to sustain its jurisdiction. Those facts, if supported by any testimony whatever, are conclusive on the Courts, quite regardless of what the balance of the record may show. The practitioner is more and more faced with the situation where he cannot advise a client to file a Petition in Court, or even to defend against a Complaint.

Where the Radio Commission "deleted" two stations in Chicago and gave the air to two stations in Gary, the Supreme Court said:

> "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an

administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action."—Radio Commission v. Nelson, 289 U. S. 266, 276-7.

The opinion then pointed out that the Commission must consider "the equities of existing stations":

"But the weight of the evidence as to these equities and all other pertinent facts is for the determination of the Commission in exercising its authority to make a 'fair and equitable allocation.'"—Id., p. 285.

It is an interesting fact that in this case the Commission would not adopt the findings of fact made by its own trial examiner:

"Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence.'"—Id., pp. 285-6.

It must be recognized that the Supreme Court had long since yielded the findings of facts to the Executive in such governmental affairs as the Chinese Exclusion Act and the Regulation of the railroads by the Interstate Commerce Commission. There would seem to be a wide divergence between those governmental acts and the acts of a Commission which attempts to censor business morals, or one that can make and unmake broadcasting stations at will, quite regardless of the money invested in them.

Mr. Jackson remarks that "The Federal Trade Commission represents an extension of the rule of law into the field of unfair competition." If the sponsors of that Act had any such thought in mind in 1914 they carefully concealed it in the debates. Throughout those debates the proponents of the act repeatedly asserted that it was merely an extension of the Clayton Act to curb monopolies before action could be brought under the anti-trust laws (L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985, 993-998).

The latest denial of the right to an effective judicial review came in Federal Trade Commission v. Algoma Lumber Co. *et al,* where the Supreme Court, on January 8, 1934, reversed the Circuit Court of Appeals for the 9th Circuit. In that case there were conflicting opinions and publications concerning "Northern White Pine" and the "California White Pine." The Commission selected the opinions of those experts and publications which held that the so-called "California White Pine" was not really "White Pine."

In that case the Circuit Court of Appeals considered with great care the expert opinions in the testimony and concluded with the statement:

"It is the conclusion of the court that viewing the testimony in the light of all the facts of the case, it is insufficient to support findings that petitioners' use of the commercial name California White Pine is an unfair method of competition or that its prevention would be in the interest of the public."—Algoma Lumber Co. et al. v. Federal Trade Commission, 64 F. (2d) 618, 624.

But the Supreme Court, in reversing, said:

"'The findings of the Commission as to facts, if supported by testimony, shall be conclusive,' 15 U. S. C. Sec. 45. The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n v. Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power."—Federal Trade Commission v. Algoma Lumber Co. *et al.*, 291 U. S. 67, 73.

The Commission had decided the case on conflicting opinions and "uncertain and conflicting inferences." On that very point the Courts of Appeal had restrained the Commission from the outset.

The first case to reach the Supreme Court involving the Federal Trade Commission was that of the Winsted Hosiery Company. The primary issue in that case was the status of "wool" and the secondary meaning of "Merino wool" in the trade.

The Court of Appeals held:

"In this case there was obviously no unfair method of competition as against other manufacturers of underwear. . . Assuming that some consumers are misled because they do not understand the trade significance of the labels, or because some retailers deliberately deceive them as to its meaning, the result is in no way connected with unfair competition, but is like any other misdescription or misbranding of products. Conscientious manufacturers may prefer not to use a label which is capable of misleading, and it may be that it will be desirable to prevent the use of the particular labels, but it is in our opinion not within the province of the Federal Trade Commission to do so."—Winsted Hosiery Co. v. Federal Trade Commission, 272 Fed. 957, 960-1 (C. C. A. 2d).

On certiorari the Supreme Court reversed the Circuit Court of Appeals and established in the Federal Trade Commission general jurisdiction over all "misbranding," saying:

"For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. . . That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition. And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby."—Federal Trade Commission v. Winsted Co., 258 U. S. 483, 493, 494.

After the passage of the Federal Trade Commission Act there were bills repeatedly introduced in Congress to enact what was known as the "Pure Fabric Law." See recital in Raladam Co. v. Federal Trade Commission, 42 F. (2d) 430, 437. But the Supreme Court in the Winsted Case had, in effect, enacted such a law, not only with regard to misbranding fabrics, but covering the misbranding of all articles of commerce. Notwithstanding opinions to the contrary in the Circuits, the Federal Trade Commission did, after the Winsted Case, "act the part of a petty traffic officer in the great highways of commerce." For example, see Flynn & Emrich Co. v. Federal Trade Commission, 52 F. (2d) 836, 838.

Notwithstanding the Winsted Case, the Circuit Courts of Appeal consistently endeavored to limit the broader powers claimed or asserted by the Federal Trade Commission. There were two main lines of attack on the orders issued by the Commission, one substantive and the other jurisdictional.

It was submitted in the Circuits, and sustained, that the Courts had the right to review and reverse findings of the Commission based on opinions or conclusions or inferences drawn from the facts.

For opinions, see L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985, 988, 989, 990, 991; James S. Kirk & Co. v. Federal Trade Commission, 59 F. (2d) 179, 182, 183.

On conclusions of fact, see Curtis Publishing Co. v. Federal Trade Commission, 270 Fed. 881, 908; New Jersey Asbestos Co. v. Federal Trade Commission, 264 Fed. 509, 510, 511; Standard Oil Co. v. Federal Trade Commission, 273 Fed. 478, 481; Eastman Kodak Co. v. Federal Trade Commission, 7 F. (2d) 994, 995.

On inferences, see Arnold Stone Co. v. Federal

Trade Commission, 49 F. (2d) 1017, 1019; Raladam Co. v. Federal Trade Commission, 42 F. (2d) 430, 437.

The proceedings in the Federal Trade Commission lend themselves to this line of attack. The usual opinion recites "Findings of Fact" which are followed by a "Conclusion." Naturally a conclusion is a conclusion and the attack was ofttimes centered on that alone. More frequently, however, there were, in the findings of fact, statements which were based on opinions or inferences or conclusions from the facts found. These drew the attack.

The whole force of this line of attack was lost when the Supreme Court decided the Algoma Lumber Company Case and denied to the Court of Appeals and to itself the right of "choosing for itself among uncertain and conflicting inferences" in a case which was largely built on opinions of experts. The right of "choosing for itself among uncertain and conflicting inferences" was thereby accorded to the Federal Trade Commission only.

The second line of attack went to the jurisdiction, on the point that the Commission had introduced no fact testimony that the proceeding was in the interest of the public. See for example Federal Trade Commission v. American Snuff Co., 38 F. (2d) 547, 549; Royal Milling Co. v. Federal Trade Commission, 58 F. (2d) 581, 583.

It seemed at first that the Supreme Court left this issue to the Courts in Federal Trade Commission v. Klesner, 280 U. S. 19 and Federal Trade Commission v. Raladam Co., 283 U. S. 643, 649. But the force of those opinions was impaired, if not lost, in the later opinion in the Royal Milling Company Case. In that case the Circuit Court of Appeals for the 6th Circuit had found as facts:

"It is clear from the Klesner Case that public interest in an unfair practice may be said to exist only when a substantial part of the purchasing public is injuriously affected by it or has suffered a loss. . . There is here manifestly no threat to competition. Such effect as the Commission's orders may have upon the active competition that now exists will be in the direction of stifling rather than of preserving it. . .

"There is no finding that either the dealer or consumer obtained an inferior product, or a product other than he sought to purchase."—Royal Milling Co. v. Federal Trade Commission, 58 F. (2d) 581, 582-3.

On certiorari, the Supreme Court reversed, saying:

"We also are of opinion that it sufficiently appears that the proceeding was in the interest of the public. . . The result of respondents' acts is that purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial."—Federal Trade Commission v. Milling Co., 288 U. S. 212, 216-17.

Even on the jurisdictional facts, the Commission can make its "conclusive" findings regardless of conflicting opinions or facts. It is not difficult to find in Washington, among some one of the numerous bureaus, a government expert or a government report which will support a finding of competition and public interest.

If, in time, the Commission can cease to be so much an investigator and prosecutor it might attain a stability and judicial attitude like that of the Interstate Commerce Commission, or the Patent Office. The Courts, and its own members, have had occasion for criticizing the Commission.

While the Commission was filing Complaints at the request of the Better Business Bureaus, the Circuit Court of Appeals for the 6th Circuit refused to enforce its Order, saying:

"The Better Business Bureaus explain to their local newspapers and to the general periodicals that it would be wise to refuse this advertising [of the respondent]. The chairman of the Commission, in public addresses, and in correspondence, advises the newspapers that they will be subject to prosecution . . .; and the newspapers may suspect that, if they do not comply with the advice of the Better Business Bureaus, their general advertising patronage from the membership of these bureaus will fall off. It appears that these methods of influence . . . have destroyed a large part of petitioner's business through refusals to accept this advertising, and only the injunction of this court is needed to make the elimination complete."—Raladam Co. v. Federal Trade Commission, 42 F. (2d) 430, 437.

"The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to enact the roles of complainant, jury, judge, and counsel. This multiple impersonation is difficult, and the maintenance of fairness perhaps not easy; . . ."—John Bene & Sons, Inc., v. Federal Trade Commission, 299 Fed. 468, 471.

The late Commissioner, Mr. Humphreys, in one of his dissents said, where the Commission had issued an Order to Cease and Desist:

"The conduct of this case before the trial examiner was contrary to all judicial procedure. There was a total disregard of the rules of evidence, and, taking it as a whole, the way the trial was conducted was no credit to the Commission." —Re: Inecto Inc., 16 F. T. C. 198, 225.

It is possible that some Circuit Courts of Appeal will pursue the even tenor of their ways and avoid the clear intimation of the Algoma Lumber Company Case and the plainer mandate of the Royal Milling Company Case. Courts know that the Federal Trade Commission cannot obtain a writ of certiorari in every case in which they are defeated. But in that event it is certain that such Court will eventually be required to certify its record to the Supreme Court, and receive a reprimand. It is more likely that the Circuit Courts of Appeal will follow the ruling in those two cases.

In either event the conscientious practitioner still has the problem, increasingly more difficult, of deciding for his client whether a particular Complaint should be opposed and permitted to go to evidence and final hearing; and then to decide whether a Petition to the Circuit Court of Appeals is justified on an Order issued against the client.

That the Bar may be alive to this problem would seem to be indicated by the number of consent decrees issued by the Commission without testimony or hearing. Expense is an item. The usual proceedings in the Federal Trade Commission involve large expense. Depositions are taken in distant cities and final hearing is in Washington. It would be cheaper for the usual Respondent to try the case in the Federal District Court. On expense we have fallen from the frying pan of the District Court into the fire of the Federal Trade Commission.

The matter of "administrative tribunals" lies with the legislative branch of the government, as always. The legislature should be brought to see that, when a Commission is established for the purposes of investigation and report, an effective review by the Courts should be provided. And where the Commission is given judicial powers, the legislature should be brought to see that there is the right of appeal such as is given at law and in equity in the Courts. Can any lawyer envision a Federal statute providing that the findings of fact by a District Court shall be "conclusive" upon the appellate Courts? Yet the Federal statutes so provide as to Commissions, the members of which may all be laymen. *Quo vadis?*

RIGHTS OF LANDLORD AND HIS BANKRUPT TENANT

How to Balance the Scales of Justice among the Landlord, the Tenant and the Other Creditors Involves Some Very Troublesome Problems Both in the Administration of the Bankruptcy Act and in Drafting Suitable Leases—Claims for Future Rent—Landlord's Claim for Damages—Tenants' Rights—Amendment of June 7, 1934—Some Practical Suggestions

By Milton J. Keegan
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DURING a depression the judicial machinery of bankruptcy runs double shift with Congress trying to patch up defective parts. As the end of the lean years approaches a brief survey of what is being ground out for landlords and their bankrupt tenants seems opportune.

During the several years when the echoes of the 1929 crash were reverberating up and down the land, bankruptcies and rumors of bankruptcies became embarrassingly frequent. Certain alleged radio comedians during those trying times took sufficient notice of the threatened epidemic to explain to their harrassed listeners that bankruptcy was a predicament in which a man put his money in his pants' pocket and gave his coat to his creditors.

Of course, except in the rare cases where the National Bankruptcy Act is prostituted successfully by a fraudulent bankrupt, no such thing happens. This discussion is concerned with problems in ordinary cases where an insolvent tenant seeks no more than a chance to get the fresh start which society intended to give him via the bankruptcy route.

However, in orderly normal cases, many a landlord has felt that he has been handed back the worn and depreciated coat of his bankrupt tenant, while he patiently witnessed other creditors carry off the tenant's pants, or at least extract the purse and divide the spoils.

Sometimes a tenant hopelessly saddled with debt has tried to free himself by running the gamut of the bankruptcy court and has emerged stripped of his material assets, but with a lease of 99 years, more or less, or huge claims for damages still clinging to his back.

How to balance the scales of justice among the landlord, the tenant, and the other creditors, involves some very troublesome problems, both in the administration of the Bankruptcy Act and in drafting suitable leases.

Since 1898, when the present Bankruptcy Act was passed, the Courts from time to time have struggled with the problem with indifferent success. Then the "Brain Trust" came to bat and knocked out the Amendatory Act of June 7, 1934. Whether this latest effort was a base hit or merely a foul ball is a matter with which this discussion is not primarily concerned.

However, all lawyers are, from time to time, interested in getting landlords and tenants into and out of long or short term lease entanglements. The respective rights of the various parties in the bankruptcy courts, therefore, should be of some interest.

I.—In General

When, during a period of deflation, reflation, or inflation, a tenant goes bankrupt, his trustee in bankruptcy first determines whether the leasehold has any value above the reserved rentals which can be liquidated for the general creditors. If it has, the trustee elects to administer the lease as one of the assets of the bankrupt's estate and, of course, the trustee or his assignee must, like Rastus, assume the worries about "what they're going to do when the rent comes 'round.'"

Most frequently, however, the leasehold has no value, and the trustee elects not to take it over as part of the assets of the bankrupt estate. This is especially true during periods of deflation in rental values, such as recent years, where the reserved rent is often double the present rental value. In some cases the tenant's primary purpose in coming to the bankruptcy court is to be unsaddled of a lease that is breaking his back. These contingencies are the ones with which this discussion is concerned. How do the landlord, the tenant and the other creditors fare in the proceeding?

The difficulty of dispensing justice among the landlord, the bankrupt tenant and the other creditors arises in the following problems:

First: If the landlord chooses not to cancel the lease, to what extent can he be protected or compensated for future rents?

Second: If the landlord terminates the lease, to what degree can he obtain reimbursement for damages arising from the tenant's abandonment of the lease; and what monetary yardstick, if any, can be used to measure such damages?

Third: What assurance has a tenant that bankruptcy, when it strips him of all his assets, will also relieve him from his burdensome lease?

II.—Claims for Future Rent

A landlord cannot eat his cake and have it too. To preserve his claim for future rent, as distinguished from damages, he must keep the lease alive. This he may sometimes accomplish by doing nothing, when the trustee disaffirms the lease. He may let the property lie vacant. He may enter only to protect it from the elements or other deprecia-

tion. The landlord may even re-enter as agent for the tenant and release as the lessee's agent without terminating the lease.

The Bankruptcy Act of 1898, prior to the recent amendment, was silent as to the provability of claims for future rent.[1] The common statement met with in texts and decisions construing the 1898 Act was to the effect that a claim for future rent was not provable in bankruptcy.[2] That such generalizations needed amplification and qualification, was recognized by the French Judge who observed: "All generalizations are false—including this one."

The rule frequently was criticized[3] as working a hardship on the landlord by excluding him from the bankruptcy court to the unjust enrichment of the other creditors and giving him only the valueless right to collect after bankruptcy from the tenant's empty corporate shell, and on the tenant by not discharging claims for rent which might well prevent his financial rehabilitation. When the question finally reached the United States Supreme Court in February of 1934,[4] the difficulties involved were recognized, but the Court said:

"If the rule is to be changed Congress should so declare."

The decision, however, did not decide that future rentals which had been accelerated at or prior to the petition in bankruptcy were not provable. Some of the federal courts seeking to narrow the strict rule in rent cases allowed claims for accelerated rent.[5] On long term leases and on any unassignable lease a rule allowing claims for accelerated rent was unsatisfactory to both the landlord and the other creditors. It is easy to imagine the just indignation arising in the camp of the bankrupt tenant's other general creditors when a landlord walks in with a claim for accelerated rent on the balance of a 99 or even a 10 year lease. Instances would also be rare in which the allowance of an accelerated rent claim on a long term lease would give a landlord a sufficient dividend to compensate him for turning over a paid-up leasehold to the trustee in bankruptcy or his assignees or to the discharged tenant.

Other instances in which the courts more successfully avoided the harsh rule of the rent cases are those in which claims labeled future "rent" have been allowed because upon analysis they were found not to be claims for rent. "There is no magic in the word 'rent'." What is a covenant for future rent and what is not a covenant for future rent is a question of law, unaffected by any "rent" label the parties may have plastered on it in their lease.[6] Since the rule that future rent is not provable is based upon the common law rule that rent proceeds from the soil, and is not earned until occupancy is enjoyed, the federal courts hold the rule is not applicable to a claim based upon a covenant in a lease which, when analyzed, is not strictly a profit issuing out of the land.[7]

Congress, in hunting for a panacea for what ailed the parties in their predicament, correctly decided it could not be found in such a simple remedy as amending Section 63 of the Act of 1898 so as to allow all claims for future rent. The remedy which Congress offers is found in the Act of June 7, 1934, Section 4, which amended Section 63 of the National Bankruptcy Act of 1898 to read in part as follows:

"Debts of the bankrupt may be proved and allowed against his estate which are . . . claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, but the claim of a landlord for injury resulting from the rejection by the trustee of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date."

The Amendment does not, except possibly by far fetched implication, give the bankruptcy court or the trustee in bankruptcy any power to terminate the lease.[8] It has never been held under our Bankruptcy Act that the trustee's disaffirmance of a burdensome lease ipso facto effected a surrender to the landlord. On the contrary it merely turns the leasehold back to the bankrupt tenant the same as any other worthless asset which the trustee does not choose to take over and administer for the benefit of the general creditors.

The Amendment fails to make any clear distinction between claims for future rent when the lease is not terminated and claims for damages after termination of the lease. Of course, in many contract cases the border line between a claim for collection of a contract debt and a claim for compensatory damages for breach of the contract is blurred and indistinct because of similarity in the result reached. However, this is not true with leases. For a landlord to keep the lease alive and claim future rent is quite different from the case where he accepts a surrender of the lease and claims damages.

The answers to questions regarding future rent claims will be less difficult if we first consider what the courts have done with landlord's claims for damages and what the recent Act has to say when the lessor accepts a surrender of the lease and chooses the damage route instead of future rent. When the lease is terminated and the landlord is looking for damages only, Congress, in its

1. Act of July 1, 1898, (30 Stat. 544) Sec. 63, U. S. C. A. Title 11, Sec. 103.

2. See leading early case *In re Roth & Appel* (C. C. A. 2nd Cir. 1910) 181 Fed. 667 followed in *Manhattan Properties, Inc. v. Irving Trust Co.* (1934) 291 U. S. 320, 78 L. Ed. 824, rehearing denied 292 U. S. 607, 78 L. Ed. 1468.

3. Garrison, Lloyd K. "The New Bankruptcy Amendments; Some Problems of Construction," Wisc. Law Rev. (June 1933) 8: 292, Schwabaker and Weinstein, "Rent Claims in Bankruptcy" (1933) Col. L. Rev. 33: 212. McLaughlin, "Amendment of the Bankruptcy Act" (1927) 40 Harv. L. R. 583, 608.

4. *Manhattan Properties, Inc. v. Irving Trust Co.* 291 U. S. 320.

5. *In re Schechter* (C. C. A. 3rd Cir. 1930) 39 F. (2d) 18; Remington "Bankruptcy" (2ed 1923, as amended by 1932 Suppl.) Sec. 796, 2: 195 ff. See also Wilson v. Pa. Trust Co. (C. C. A. 1902) 114 Fed. 742 where the Court by dictum recognized; "These consequences would follow its (accelerated rent claim's) enforcement . . . the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee . . . for the benefit of the estate."

6. *Paston v. Kennedy* (1893) 70 Miss. 865, 12 Sou. 546; *Miners' Bank v. Heilner* (1864) 47 Pa. 452; in re *Reivership of Lightwell Steel Sash Co.* (1918) 12 Del. Ch. 60, 105, Atl. 276; *Donnellon v. Read* (1832) 3 B. & Ad. 899, 23 E. C. L. 391, 6. E. R. C. 298.

7. In re *Outfitters' Operating Realty Co.* (C. C. A. 2nd Cir. 1934) 69 F. (2d) 484; *Trust Co. of Georgia v. Whitehall Holding Company* (C. C. A. 5th Cir. 1931) 53 F. (2d) 635; In re Blum Bros. Co. (D. C. S. D. Ohio 1932) 55 F. (2d) 723. But see *Topeka State Bank v. Little* (1929) 127 Kan. 796, 274 Pac. 1118.

8. The more elaborate provisions for rejecting lessees contained in new Section 77B of the Act of June 7, 1934, have not been lost sight of. However, section 77B covers the reorganization of corporations in lieu of bankruptcy. It also allows the landlord a maximum damage claim three times as large as the one provided for by the Amendment to Section 63. It is difficult to see how section 77B is any more applicable to the rights of landlord and tenant generally in bankruptcy proceedings than was the new section 74(a) of the Act of 1933 which made claims for future rent provable in proceedings for compositions and extensions for persons other than corporations. In holding the future rent clause of Section 74(a) was not applicable generally to proceedings in bankruptcy in *Manattan Properties, Inc. v. Irving Trust Co.*, 78 L. Ed. 824, 835, the Supreme Court said: "It is highly unlikely that if the quoted sentence had been intended as an amendment of Section 63(a) it would have been placed in context dealing only with the novel procedure authorized by the new sections."

recent effort to untangle the matter, has furnished the parties a much better road map with which to find their way about the bankruptcy courts.

III.—LANDLORD'S CLAIM FOR DAMAGES

When Dame Rumor whispers that a tenant is financially embarrassed, everyone supposes it is because he is so shy in his payments. If his lease is too burdensome he may be forced voluntarily or with regrets to lock up his place of business and hand the keys in at the bankruptcy court. Thereafter, in the usual course of events, the keys end up in the landlord's pocket with the lease terminated. Theoretically the trustee, when he disaffirms the lease, hands the keys back to the lessee. The bankrupt tenant, of all persons, has the least longing for them. The agitated landlord can usually be prevailed upon to take the keys before the tenant throws them into the street.

The landlord's dilemma in trying to save his rights or his property is frequently somewhat analogous to Judge Bradford's predicament when he was presiding in a mountainside log courthouse in Central City in the flush gold days of Colorado Territory. The court room was packed. Jim Cavanaugh was in the midst of an impassioned plea to save his client's neck from the noose, when the sheriff entered and whispered in the judge's ear that the court house was slipping into the ravine below. "Mr. Cavanaugh," said Judge Bradford, calmly but sternly, "sit down." "Your Honor," cried the astonished Cavanaugh, "this is an outrage on my client's rights—". 'Mr. Cavanaugh," interrupted Judge Bradford, "I am not discussing a point of propriety with you. I'm trying to get you to sit down before this whole shebang goes to hell!"[9]

The landlord's re-entry to save his property ordinarily terminates the lease, cuts off all claims for future rent, and frequently wipes out claims for damages. However, by statute or by stipulation, if properly drawn, the landlord may retain both the property and a claim for damages.[10] Most lawyers when drafting leases insert one of the 57 varieties of stipulations for damages in the event of the tenant's breach or bankruptcy. However, the recorded decisions show that after much long and expensive litigation most landlords have discovered that the wrong recipe was used in their particular leases.

In composing lease covenants, lawyers have had the adventure of betting on the future decisions with client's money. However, the legal draftsmen of the past have usually failed as prophets. Sometimes they failed by creating a claim for future rent instead of one for damages. If they got the provision properly earmarked as damages, they inserted the wrong yardstick—either the damages couldn't be measured until the end of the term or if they were presently measured by the method provided they amounted to a penalty.[11]

A search for types of covenants for damages which have withstood the acid test to date discloses one recently approved by the United States Supreme Court.[12]

The practical reasons justifying the allowance of a landlord's claim for damages in one case usually apply with about equal vigor in other cases. It is difficult for a landlord to understand why his claim for damages should be "buried in the dreary waste of unproved claims," because the lawyer who drew his lease in years gone by was not lucky or skillful enough to prophesy what particular type of covenant would be held by the courts to create a provable claim against his bankrupt tenant.

England long ago settled the problem not by allowing or disallowing claims for future rent, but by having the trustee's disclaimer terminate the burdensome lease and by permitting the court to fix the landlord's damages at such amount "as to the Court may seem equitable" and then letting the landlord prove such a sum as any other debt.[13]

Congress, by the Amendment of June 7, 1934, took a step in the direction of the solution reached by England. The Amendment, however, furnishes little new light on what variety of damage clause, if any, must be in a lease to give birth to a provable claim for damages in the event of the tenant's bankruptcy. The Act intimates that "the rejection by the trustee of an unexpired lease" may give rise to a claim for damages as well as a "covenant contained in such lease" but the Act is silent as to whether such rejection actually terminates the lease as between the landlord and tenant. Unless the trustee's disaffirmance of a burdensome lease ipso facto effects a surrender of the lease to the landlord, it is difficult to understand upon what theory the trustee's refusal to administer a burdensome asset of the tenant damages the landlord. True, such action may make it wise for the landlord thereafter voluntarily to accept a surrender from the tenant, but that has always been held to be strictly an affair between the landlord and tenant and governed by the provisions of the lease as to damages or no damage.

IV.—TENANTS' RIGHTS

Several centuries of alternating periods of prosperity and depression have rolled by since Anglo-American jurisprudence looked upon an honest bankrupt merely as an unfortunate tradesman and not a criminal. Of course no such rosy path is prepared for an insolvent business-man as

9. Dicta, 10:20.

10. Some care must be taken to preserve this claim for damages because, as stated by Mr. Justice Holmes in *Gardiner v. Butler & Co.* (1918) 245 U. S. 603, 62 L. Ed. 505: "The law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke."

11. *Kothe v. Taylor Trust* (1929) 280 U. S. 224, 74 L. Ed. 382; *Manhattan Properties, Inc. v. Irving Trust Co.* (1934) 291 U. S. 320.

12. In re *Outfitters Operating Realty Co., A. W. Perry, Inc., v. Irving Trust Co.*, (1934) 69 F. (2d) 90; affirmed Dec. 3, 1934, 79 L. Ed. 174. The lease contained a covenant which read in part: ". . . . it is agreed that the filing of any petition in bankruptcy . . . by or against the Lessee shall be deemed . . . a breach . . . and thereupon, ipso facto, . . . this lease shall . . . be terminated; and . . . the Lessor shall . . . be entitled to recover damages for such breach in an amount equal to the amount of rent reserved for the residue of the term hereof, less the fair rental value of the premises for the residue of said term." See also In re D. C. Clare Shoe Co. (D. C. D. Mass. 1913) 211 Fed. 341; In re Twentieth Century Milling Exchange, Inc. (1930) 41 F. (2d) 237.

13. Bankruptcy Act, 1883, 46 and 47 Vict. Chap. 52, Sec. 55, which provides in part:

"(1) Where any . . . property of the bankrupt consists of land of any tenure burdened with onerous covenants, . . . the trustee . . . may . . . disclaim the property.

"(9) The disclaimer shall operate to determine . . . the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property . . . but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights and liabilities of any other person.

"(5) The Court may . . . make an order rescinding the contract on such terms as to payment . . . of damages . . . for the non-performance of the contract or otherwise, as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

"(7) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

the course plotted out by the colored blacksmith in Virginia who closed his shop and posted the following placard on the door:

"Notice—De co-pardnership heretofore resisting between me and Mose Skinner is hereby resolved. Dem dat owe de firm will settle wid me. Dem dat de firm owe will settle wid Mose."

A bankruptcy court can only discharge a bankrupt tenant from his provable debts.[14] Claims against him which are not provable follow him out of the bankruptcy court to catch up with him when he tries his new start.

If the discharged bankrupt is a corporation the empty corporate shell can be left by the stockholders to die a natural or an "artificial" death. The undischarged debts for all practical purposes are buried with this dead artificial corporate creature. The demise of the discharged corporate shell may be natural. Sometimes it seems merely "artificial" to the landlords in instances where the stockholders of the bankrupt tenant appear to walk out into the hall and back, organize a new corporation with a similar name, and then resume business at the old stand or across the street under a new and more satisfactory lease.

When an individual bankrupt tenant emerges stripped from the bankruptcy court to try anew his financial rehabilitation, his fresh start has in the past frequently been embarrassed by landlord's claims for future rent or for damages which rise again to haunt him. Unprovable claims in bankruptcy usually mean provable claims after bankruptcy.

What happens to the bankrupt tenant after his discharge is usually left to the state courts.[15] With the conflict of authority among the federal courts it has sometimes been quite difficult for a state court correctly to dispose of a landlord's subsequent suit against the discharged tenant.[16] If the landlord's claim was not presented in the bankruptcy proceedings the state court is left in the dark. Even if the claim is presented and disallowed in bankruptcy, it is not conclusive on the state court as has been pointed out by Judge Swan.[17]

Unless the courts can find in the recent Amendment some power conferred upon bankruptcy courts to terminate leases as between a landlord and his bankrupt tenant, the tenant's predicament is as precarious as it was before. Of course, if the pot to divide among the general creditors is a sizable one, there will now be more temptation for a landlord voluntarily to accept a surrender and then assert a claim for damages in the bankruptcy proceedings.

V.—SUMMARY

When the Amendment of June 7, 1934, was enacted, recent decisions were gradually clearing this section of the judicial forest which in 1932 was still being described by the Federal Courts as in "'hopeless confusion' in the decisions upon the question of whether claims arising out of leases . . . are provable in bankruptcy."[18]

If the recent Amendment makes the trustee's rejection of a burdensome lease effect a cancellation of the lease, then the provability or nonprovability of claims for future rent becomes of little importance.

However, if the courts are unable to find in the Amendment any power in the trustee or the bankruptcy court to surrender the lease to the landlord, then claims for future rent predicated upon the landlord's refusal to accept a surrender of the lease would seem to be left where they were before June 7th. If the courts take the alternative view—namely, hold that a future rent claim where the lease is not terminated is now provable, then the machinery for fixing the size and limitation of the claim, the extent of the tenant's discharge, and the rights of the parties to possession and profits from the property is cumbersome and unsatisfactory and will be prolific of much litigation.

In cases where the lease is terminated leaving a landlord's claim for damages in lieu of future rent, the parties have fared much better under the recent Amendment. However, in the past only a few varieties of damage clauses in leases have been held to give rise to a provable claim for damages in bankruptcy. Landlords too frequently have discovered that there was nothing certain about the merits of their particular brand except after prolonged litigation. There is no definite assurance in the latest Amendment that if a landlord does not have a damage clause in his lease or if he has one in a form which has been condemned in the past that his damage claim will not still be kicked out of the bankruptcy court.

In many long term leases the landlords have tried to protect themselves by having the tenant put up a bond with collateral or a surety, or both, to insure the landlord either that the lease will be carried out or that damages will be paid. The effect of the recent Amendment on these bonds suggests some very interesting problems but they are beyond the scope of this discussion.

To protect a landlord, new leases should contain damage clauses patterned after the provable type—at least until the Supreme Court finds occasion to decide what varieties of landlord's damage clauses, if any, are required under the new Amendment. Until the courts have settled the question of whether under the Act as now amended the Bankruptcy Courts have power to terminate leases, the prospective tenant should, unless the term of the lease is short, create a corporation to take the lease. Its undischarged liabilities for future rent or damages in such cases are usually buried with its carcass.

If a lease is to cover in part any obligations on the part of the tenant which do not "proceed from the soil" the legal draftsman should scrupulously avoid labeling these obligations "rent" or anything that looks like rent. While courts will look behind a "rent" label in determining provability of claims, careless draftsmanship invites expensive and sometimes very uncertain litigation.

When, after a tenant becomes bankrupt, leases

14. Bankruptcy Act, Sec. 17. "A discharge in bankruptcy shall release a bankrupt from all his provable debts," . . . U. S. C. A., Title 11, Sec. 35; In re Frischknecht (C. C. A. 2nd Cir. 1915) 228 Fed. 417, 420.

15. In re Goldberg (D. C. S. D. N. Y. 1931) 52 F. (2d) 156; In re Hubbard (D. C. W. D. N. Y. 1932) 57 F. (2d) 213; In re Munsie, 32 F. (2d) 304, reversed (C. C. A. 2d Cir. 1929) 33 F. (2d) 79, 80.

16. Topeka State Bank v. Little (1929) 127 Kan. 796, 274 Pac. 1118, directed a judgment for the landlord against a tenant where part of the claim should have been proven in the tenant's prior bankruptcy proceedings according to several late federal court decisions cited supra fn. 7.

17. In re Munsie, 33 F. (2d) 79, 80:

"The scope of the (tenant's) discharge does not depend upon the amount for which the (landlord) creditor proves; it is equally effective if the claim is not proved at all. Indeed, even an erroneous disallowance will not prevent the debt from being discharged, if it is provable."

18. In re Hubbard, supra, fn. 15.

of ancient vintage are brought to a lawyer for analysis, too often it is almost impossible to advise the landlord, the tenant, or the other creditors with much certainty on many phases of the matter except the expenses of litigation.

A statistician, after painstaking calculations, claims to have figured out that "if all the lawyers in the world were laid end to end they would not reach a conclusion." Nevertheless, we venture that the most satisfactory and equitable solution of the problems to all concerned will be along the following lines:

The tenant's adjudication in bankruptcy should constitute an anticipatory breach of any non-assignable lease and of all leases which the trustee disaffirms. In such cases the trustee's disaffirmance should terminate the lease. The landlord in all these cases, regardless of the type of stipulated damage clause, if any, in the lease, should have a provable claim for actual damages in the bankruptcy court, subject to a fair maximum limitation in amount. The bankruptcy court should liquidate the damages by finding the difference between the present value of the future rent reserved and the fair rental value for that period valued in the present like a fee.

This solution in substance would be to profit by England's experience with and solution of these problems, and use a workable and fair measure of damages such as the one already approved as non-penal by our Supreme Court, with the addition of a reasonable top limit to the size of the claim, such as is set forth in our recent Amendment. If this solution is desirable in one case, it is equally desirable in all similar cases. It would give all bankrupt tenants with burdensome leases a fair chance for a fresh start after their discharge. It would provide for an equitable distribution of the bankrupt's assets among the landlord and other general creditors.

It is hoped that the Courts will be able to reach this desirable result under the recent Amendment. If the faults of the Amendment prevent such a construction, a further Amendment will be needed and, in all probability, will in time be enacted.

TENTATIVE PROGRAM OF LOS ANGELES MEETING

(*Continued from page* 359)

Wednesday Morning, July 17, 10 o'Clock.

Third Session of the Conference, Samuel S. Willis, Detroit, Michigan, presiding.

The discussion and disposition of matters before the Conference.

Election of Officers and members of the Council.

Introduction of New officers and members of the Council.

Address of Chairman for 1935-36.

Wednesday Afternoon, at 12:30 o'Clock.

Luncheon of State Chairmen and Delegates.

Conference on Personal Finance Law

Annual Luncheon Meeting

Tuesday, July 16, 12:30 P. M. Biltmore Hotel

Edmund R. Beckwith, New York City, Chairman.

International Association for the Protection of Industrial Property

(American Group)

Annual Luncheon Meeting

Biltmore Hotel, Wednesday, July 17, at 12:30 o'clock.

National Conference of Commissioners On Uniform State Laws—Forty-Fifth Annual Meeting

Biltmore Hotel

Tuesday, July 9, to Monday, July 15, Inclusive, 1935

Tuesday, July 9, 9:30 A. M.

Section and Committee Meetings.

2:00 P. M.

First Session of Conference:

1. Address of Welcome.
2. Response Thereto.
3. Roll Call.
4. Reading of Minutes of Last Meeting.
5. Announcement of Appointment of Nominating Committee.
6. Address of the President.
7. Report of the Treasurer.
8. Report of the Secretary.
9. Report of Executive Committee.

Reports of Standing Committees.

Reports of General Committees.

Reports of Sections.

Reports of Other Committees.

Wednesday, July 10, 9:30 A. M.

Deferred Section and Committee Reports.

Consideration of Report of Committee on Compacts and Agreements Between States.

Consideration of Report of Committee on American Law Institute Code of Criminal Procedure.

Consideration of Report of Committee on Uniform Presumption of Death Act.

Consideration of Report of Committee on Uniform Statute of Limitations Act.

Consideration of Final Draft of Uniform Bank Collection Act (with a view to adoption of the Act already tentatively adopted).

Consideration of Second Tentative Draft of Uniform Vendor and Purchaser Risk Act.

2:00 P. M.

Consideration of Final Draft of Uniform Airports Act.

Consideration of Third Tentative Draft of Uniform Aeronautical Regulatory Act.

Consideration of First Tentative Draft of Uniform Substantive Law of Aeronautics Act.

Thursday, July 11, 9:30 A. M.

Consideration of Second Tentative Draft of Uniform Business Records as Evidence Act.

Consideration of Second Tentative Draft of Uniform Composite Reports as Evidence Act.

Consideration of Second Tentative Draft of Uniform Judicial Notice of Foreign Laws Act.

Consideration of Second Tentative Draft of Uniform Official Reports as Evidence Act.

Consideration of Final Draft of Uniform Acknowledgment of Instruments Act.

Consideration of Third Tentative Draft of Uniform Civil Depositions Act.

2:00 P. M.

Consideration of Fifth Tentative Draft of Uniform Estates Act.

Consideration of First Tentative Draft of Uniform Transfer of Dependents Act.

Friday, July 12, 9:30 A. M.

Consideration of Fourth Tentative Draft of Uniform Trustees' Accounting Act.

Consideration of Second Tentative Draft of Uniform Trusts Act.

2:00 P. M.

Consideration of Report of Committee on Uniform State Department of Justice Act.

4:30 P. M.

Reports of Committees on Memorials.

Saturday, July 13, 9:30 A. M.

Consideration of Fourth Tentative Draft of Uniform Agricultural Cooperative Association Act.

Monday, July 15, 9:30 A. M.

Consideration of First Tentative Draft of Other Proposed New Uniform Acts.

Unfinished Business.

New Business.

Adjournment.

The Visit to Hawaii

Information received from the President of the Association of Hawaii indicates that a most interesting experience is in prospect for those members of the Association who have accepted the invitation to visit the Islands following the Los Angeles meeting. The tentative program which has been arranged by the Bar Association of Hawaii includes a reception by the Governor, fascinating trips to points of interest, and numerous entertainment features.

Reservations for the trip have been made by the following:

Mr. and Mrs. William O. Beall, Tulsa, Oklahoma;
Mr. and Mrs. Joseph F. Berry, Hartford, Connecticut;
Mr. and Mrs. Hope Caldwell, New York City;
Mr. and Mrs. Frederick B. Campbell, New York City;
Mr. and Mrs. Francis J. Carney, Boston, Massachusetts;
Mr. and Mrs. Walter Chandler, Memphis, Tennessee;
Mr. and Mrs. J. C. Denton, Tulsa, Oklahoma;
Miss Anne M. Evans, St. Louis, Missouri;
Mr. and Mrs. Earle W. Evans and Miss Elizabeth Evans, Wichita, Kansas;
Judge and Mrs. Robert D. Garver and Miss Garver, Kansas City, Missouri;
Mr. and Mrs. James E. Goodrich, Kansas City, Missouri;
Mrs. W. B. Hardie, Washington, D. C.;
Judge and Mrs. Samuel J. Harris, Buffalo, N. Y.;
Mrs. Charles Hartin, St. Louis, Missouri;
Mr. and Mrs. Lon O. Hocker, St. Louis, Missouri;
Mr. and Mrs. Benedict M. Holden and Mr. Holden, Jr., Hartford, Connecticut;
Mr. and Mrs. Henry H. Hollencamp, Dayton, Ohio;
Mr. and Mrs. Henry M. Huxley and Miss Margaret C. Huxley, Chicago, Illinois;
Mr. Theodore Athos Joslin, Adrian, Michigan;
Mr. and Mrs. Harry S. Knight, Sunbury, Pennsylvania;
Mr. and Mrs. Frank H. Kunkel, Cincinnati, Ohio;
Mr. and Mrs. John A. Luhn and Miss Catherine Luhn, Baltimore, Maryland;
Mr. Walter A. Lybrand, Oklahoma City, Oklahoma;
Mr. Charles H. Meyer, New York City;
Mr. Jesse A. Miller, Des Moines, Iowa;
Mr. and Mrs. Alfred K. Nippert, Cincinnati, Ohio;
Mr. and Mrs. Frank Pace, Little Rock, Arkansas;
Mr. and Mrs. James Craig Peacock and son, Chevy Chase, Md.;
Mr. Province M. Pogue, Cincinnati, Ohio;
Mr. and Mrs. Roscoe Pound, Cambridge, Massachusetts;
Mr. and Mrs. William Lynn Ransom, Miss Dorothy Ransom, Mr. William Lynn Ransom, Jr., and Mr. Robert Crawford Ransom, New York City;
Judge and Mrs. Albert L. Reeves, Kansas City, Missouri;
Mr. and Mrs. Edward S. Rogers, Chicago, Illinois;
Mr. George B. Rose, Little Rock, Arkansas;
Mr. and Mrs. Henry C. Shull, Sioux City, Iowa;
Judge and Mrs. Morris A. Soper, Baltimore, Maryland;
Mrs. Gladys Berger Stewart, Ava, Missouri;
Mr. and Mrs. Mayner Wallace and son, St. Louis, Missouri;
Mr. and Mrs. Henry D. Williams, New York City;
Mr. Samuel Williston and Miss Emily Williston, Cambridge, Mass.;
Mr. George H. Wilson, Quincy, Illinois;
Judge Isaac Wolfe, New Haven, Connecticut.

Arrangements for Annual Meeting at Los Angeles July 16 to 19, inc., 1935

HEADQUARTERS: BILTMORE HOTEL

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
Biltmore	$5.00		$8.00	
Ambassador	5.00 to 7.00		7.00 to 11.00	$18.00 to $22.00
Clark	2.50 to 3.00	3.50 to 4.00	4.00 to 6.00	5.50 to 15.00
Hayward	2.00 to 5.00	3.00 to 7.00	3.00 to 7.00	6.00 to 12.00
Mayfair	2.50 to 3.00	3.50 to 4.00	4.00 to 6.00	8.00
Mayflower	2.50 to 3.50	2.50 to 3.50		
Rosslyn	2.50	3.50	4.00 & 5.00	9.00
Savoy	2.00 to 2.50	2.50 to 3.00	3.00	6.00

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one* person. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Space at the Biltmore will be exhausted very shortly and therefore reservations should be made promptly, and second choice of hotel should be indicated. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

TENTATIVE PROGRAM OF ENTERTAINMENT

ALTHOUGH the complete program for the entertainment of those who attend the American Bar Association Meeting at Los Angeles, July 15 to 19, inclusive, has not been announced, tentative plans have been made that promise a very full and unusually interesting week for the delegates, their families, and visitors. The details of the entertainment schedule will be officially announced in the July issue of the JOURNAL.

Tuesday night, July 16, the visiting members and guests will be taken to the justly celebrated Hollywood Bowl, to see and hear a "Symphony Under the Stars." The Los Angeles Symphony Orchestra will be the principal attraction but there will be other interesting and unusual features provided.

On Wednesday night, July 17, a general session of the Convention will be held in Philharmonic Auditorium, which will be addressed by a distinguished speaker, to be announced later, followed by the President's Reception at the Biltmore Hotel.

Thursday night, July 18, the annual dinner of the American Bar Association will be given, following the election of officers during the afternoon. The incoming president and other distinguished personages will speak at the annual dinner.

The entire afternoon of Friday, July 19, will be given over to a trip to the famous Huntington Library at Pasadena, where a most interesting and instructive exhibition of the art and literary treasures of the library will be provided. The Library has arranged the entire program for the day, which will include an elaborate tea on the terrace and beautiful grounds surrounding the art buildings.

On Friday night, July 19, the feature of the entire entertainment program will be the historical pageant depicting "The Making of the Constitution of the United States of America," which will be produced at the Philharmonic Auditorium by the Los Angeles Bar Association. The stage will be set showing an exact reproduction of the interior of Independence Hall at Philadelphia, and all the players will be attired in costumes of the period. Los Angeles Bar Association produced this pageant a few months ago with great success, and the familiarity of the large cast with the parts will enable them to give even a better production than that of a few months ago.

The prologue will consist of a series of tableaux showing the "Midnight Ride of Paul Revere," "The Liberty Bell, proclaiming liberty throughout the land," An elaborate reproduction of the characters of the famous old painting "The Spirit of 1776," and a similar reproduction of the equally famous painting "Washington Crossing the Delaware." The epilogue consists of a series of tableaux, "Emancipation," "San Juan Hill," "Democracy Triumphant," and "Miss Columbia," all with special music accompaniment.

Probably one of the most interesting days of the Convention will be Saturday, July 20, when, beginning at 10:00 in the morning and continuing throughout the day, the Los Angeles Bar Association will take the members of the American Bar Association to the various moving picture studios where they will be permitted to see the actual making of motion pictures. Luncheons will be arranged for groups of visitors at the various studios.

The California Pacific International Exposition at San Diego, which will open on May 29, has arranged a special "Harvard Day" on Saturday, July 20. The "Hospitality House" on the Fair Grounds will be open all day and there will be a Harvard dinner Saturday evening at the Fair Grounds. Those wishing further details of the very interesting day at the California Pacific International Exposition at San Diego may obtain them by writing Frederick G. Jackson, Vice President Harvard Club, 2555 Locust Street, San Diego, California.

The ladies attending the Convention will not be overlooked. Special entertainment, including luncheons on each day of the Convention Week, has been arranged by the Hostess' Committee. The Courtesy Committee has arranged to give particular attention to the comfort and entertainment of the visiting ladies.

The State Chairman for the Junior Bar Conference of the American Bar Association, Mr. Lowell Matthay of Los Angeles, announces that there has been an enthusiastic response among the young lawyers of California in the drive for membership in the American Bar Association. The name of every young lawyer in California, who is not already a member, has been placed in the hands of the local Junior Conference Committee for contact, and thus far over 250 have sent in their membership applications.

Special Train for Junior Bar Conference Members to Los Angeles Meeting

CONSIDERABLE interest in the coming Los Angeles Convention is being shown by members of the Junior Bar Conference and present indications point toward a largely attended and enthusiastic meeting, according to a statement issued by the Chairman of the Conference's Transportation Committee, Mr. Charles E. Caspari, Jr., of St. Louis, Mo.

This committee states that it has arranged for a special train over the Santa Fe route to Los Angeles, for the accommodation and convenience of members and their families and friends. The rates are the most economical possible and the train will run on a fast schedule to the convention city. It will carry regular Pullman cars, tourist class Pullmans and day coaches.

The special train will leave Chicago at 9 p. m., July 12, and arrive at Los Angeles at 8 a. m., July 15. In the event, however, that the number of those going is not great enough to justify a special train, cars will be hooked on to a train leaving Chicago at 9:15 p. m. or 10:35 p. m., July 12, and arriving

A MOVIE IN THE MAKING, HOLLYWOOD, CAL.

at Los Angeles at 8:15 a. m. or 6:30 a. m. respectively on July 15.

Connecting schedules from the East to Chicago; from the Southeast and St. Louis to Kansas City; from Texas and Oklahoma to Newton, Kan. and from Denver to La Junta, Colo., are included in a folder prepared by the Santa Fe Railroad. These connections hold good for the special train or, in case the other plan is used, for both of the trains mentioned. Further information as to detail and expense of the trip can be secured by communicating with E. H. Dallas, General Agent, Santa Fe Railway, 296 Arcade Building, St. Louis, Mo. Members intending to go are urged by Chairman Caspari not to delay but to act at once, giving number in party and Pullman reservations desired.

Leaving Chicago, the train passes during the night through the fertile farm lands of Illinois, crossing the Mississippi at Fort Madison, Iowa, in the early hours of the morning, and arrives in Kansas City, the second largest railroad center in the United States, at 8:15 a. m. It will be joined here by members from Omaha, Minneapolis, St. Paul, Des Moines, St. Louis, Jacksonville, Fla., Atlanta, Ga., New Orleans, Memphis, Chattanooga, Nashville, Tenn., and other points in the Southeast. The next stop is at Newton, Kansas, where the train will be joined by members from Texas and Oklahoma.

La Junta, Col., is reached in the late evening, and members from Colorado and Nebraska will join it there. During the night it crosses the Continental Divide and over Raton Pass (altitude 7,608 feet) arriving in New Mexico Sunday morning. This is in the midst of the old Indian country, where centuries ago the whites and the red men fought for the surrounding lands. Santa Fe, one of the oldest cities in the United States, is but a short distance away, in the heart of the Indian-detour country. Then on to Albuquerque, where a convenient stop

will be made to permit a visit with the Indians and to see the Indian museum located adjacent to the station-hotel.

The train leaves Albuquerque at 9:15 a. m. and in a very short while Isleta Indian Village can be viewed from the car windows. Gallup, center of an extensive coal mining district, is reached early in the afternoon.

The train enters California at Needles, just after passing over the Colorado River at this point. On Monday it is in the heart of the Orange Groves and the beauties of California.

It is stated that no effort will be made to have the party return in a group, as many will wish to return earlier or later than others. The round trip fares will carry a diverse route privilege permitting return via any authorized route selected at time of purchase of ticket.

PRESENT MEMBERSHIP OF LOCAL, STATE AND NATIONAL BAR ASSOCIATIONS

WHAT percentage of members of the legal profession belong to bar associations? The fact that no answer which was more than a wild guess has ever been made to this question indicates how little knowledge of a scientific character we have concerning lawyers as a group.

With plans for coordinating bar association efforts over the country and with the possibility of some federalized form of national organization in prospect, it became necessary to get as definite information as possible as to how many lawyers there were to be coordinated and how many of them already had in their blood the virus of associational activity as shown from their membership in some professional society.

The American Bar Association has long maintained a list of local associations and a careful check of these during the past year disclosed their number to be approximately 1430. This sounds like a formidable number but investigation has shown that only a third of these are really entitled to the designation of bar association if that appellation is taken to mean, as it should, not a purely social organization but a group which is definitely concerned with improvement in the administration of justice regardless of whether it concentrates on local, state, or national matters.

The work on the National Bar Program has resulted in the development of a list of 468 associations which may be termed "active." Recent postcard queries concerning the number of members and the amount of interlocking membership, which were sent out to the secretaries of this group, produced a sufficient response to enable an estimate to be made in answer to the question of how many lawyers are participating in group activities of the profession.

In answering this question, the sixteen integrated bar states must be considered separately as of course all the members of the profession in those states perforce belong to the state bar association. The figures which are given below are based on estimates but the information "while not guaranteed, is believed to be accurate" within the limitations which such a basis naturally implies.

Number of members of state bar associations:		
A. In 16 integrated bar states	33,835	
B. In 32 other states and the District of Columbia	40,651	
		74,486
Number of lawyers in 57 large city bar associations in states not having integrated bar	35,000	
Number of these not belonging to state bar associations according to average estimate of bar association secretaries	17,500	
Estimated number of members in 275 other active local bar associations in states not having an integrated bar	16,000	
Number of these members not belonging to the state bar associations, according to average estimate of bar association secretaries	8,000	
Number of members of the American Bar Association not belonging to either a state or active local bar association	3,500	
770 additional associations in states not having an integrated bar enrolling on the average 30 members each, would include approximately 23,100 members. Figuring half of these as belonging to the state bar associations, and an additional 1500 as being members of regional associations already counted or of the American Bar Association, the number of additional lawyers engaged at least nominally in bar association activities is	10,000	
		113,486

The census of 1930 showed a total of 160,605 lawyers in the United States. Since that time the number of new admissions to the bar has been as follows: 1930, 10,254; 1931, 9,824; 1932, 9,340; 1933, 9,258; 1934, 9,099. Total, 47,775.

The figures for the decade from 1920 to 1930 showed that the average number of deaths and withdrawals from the bar annually for that period were about 2.7% of the total number of lawyers. If we premise that owing to the depression this has been raised to 4% annually during the past five years, we find that the present number of lawyers is approximately 175,000. This is probably a minimum estimate of our present legal population, but if we adopt it as a figure from which to work we find that about 60% of the lawyers of the country are members of active bar associations, while about two-thirds of the entire profession hold membership in a group which calls itself a bar association.

WILL SHAFORTH,
Director of the National Bar Program.

REPORT ON COORDINATION

THE following joint report was submitted by the Coordination Committee and a Sub-Committee of the Executive Committee to the full meeting of the Executive Committee in Washington on May 9 and was unanimously approved by it:

"The Association's Special Committee on Coordination and the Executive Committee's subcommittee on the same subject present the following joint report:

"The work in behalf of the National Bar Program has brought about, for the first time in the history of the organized Bar in America, a most encouraging cooperation and concert of action on the part of the National, State and Local Bar Associations, in behalf of matters that are of great importance to the public as well as to the profession. The outstanding progress so far made through the National Bar Program gives reason to believe that, under the active leadership of the American Bar Association, a great deal can be and is being accomplished in better organizing and correlating the activities of the National, State and Local Bar Associations, without structural changes in the organization or relationships of any of these Associations.

"The views expressed by representatives of a number of states at Tuesday evening's conference, and the actions recently taken by various State and Local Bar Associations, indicate that there is a considerable and increasing opinion on the part of many members of the Bar that further steps should be taken to bring about a more representative and more inclusive organization of the Bar, with some manner of correlation between the various Bar Associations, so that the organized Bar can speak and work more effectively for the interests of the profession and the public.

"Although there are many evidences of an increasing discussion of Bar Coordination, we do not believe that it can be deemed that this sentiment or opinion in the profession has yet crystallized in behalf of definite steps or plans, or that it has yet been placed before the American Bar Association with the active support and understanding of a sufficient proportion of the membership of the organized Bar. Under those circumstances, although we believe that the American Bar Association should be receptive and sympathetic as to plans for the better correlation of its work with that of the State and Local Bar Associations, it clearly would be premature to make at this time structural changes in the American Bar Association, before the opinion of the profession in the various states has taken more definite form and has reached more nearly an agreement upon objectives and plan and has won a more extensive support and understanding in the profession. In the nature of things, the precise plan and scope of Bar Coordination should not and could not be determined and limited at this time, by generalizations formulated by committees or individuals. That definition and determination must come from the Bar itself, over a period of time, under wise and active leadership by the American Bar Association.

"We therefore recommend that the active discussion and consideration of the subject of Bar Coordination be continued and encouraged, along with the work for the National Bar Program, and that every opportunity be given to the representatives of State and Local Bar Associations to develop a consensus of opinion as to what can feasibly be done to correlate them and their work with that of the American Bar Association. This Association should not undertake at this time to sponsor a particular plan for coordinating its work with that of other Associations. When it appears clearly that those Associations wish and are ready for such a plan, your Committee will be ready with definite recommendations for consideration and decision.

"In the consideration and development of specific proposals on the subject of Bar Coordination, we believe that the legal profession will best proceed along lines consistent with its own traditions and needs, rather than by trying to adopt or adapt any plan in use by any other profession. The American Bar Association has come through the depression conditions with marked success, as to membership, finances, and steadily increasing interest and usefulness. The organization and usefulness of the American Bar can and will be further improved; but progress must not depend upon casting aside the great advance that has been made. The legal profession may best go ahead along its own lines, and "by trial and error" make steady improvement in its own organization, membership and procedure.

"We recommend the following at this time:

"(1) That the work for the National Bar Program be continued vigorously, as it has proved effective in bringing about concerted action by the National, State and Local Bar Associations in behalf of the interests of the profession and the public;

"(2) That the American Bar Association should give to the State and Local Bar Associations full opportunity to develop and place before the American Bar Association their views and specific suggestions as to what steps should next be taken for a better correlation of the work of the National, State and Local Bar Associations;

"(3) That as a part of the program for the next annual meeting of the American Bar Association in Los Angeles, an afternoon or evening session be held on the subject of the better organization of the Bar, to which session the State and Local Bar Associations shall be invited to send representatives or submit written statements of their views, and at which session there shall be an opportunity for discussion of the subject by members of the American Bar Association;

"(4) That the Coordination Committee and your sub-committee proceed jointly with the drafting of such further report as they may deem desirable, and submit the same for the consideration of the Executive Committee and the Coordination Conference."

SPECIAL COMMITTEE ON COORDINATION: Jefferson P. Chandler, Chairman; Philip J. Wickser, Harry S. Knight, James Grafton Rogers, John C. Townes.

SUB-COMMITTEE ON COORDINATION: Earle W. Evans, William L. Ransom, Frederick H. Stinchfield.

American Law Institute Reaches the Point of Maximum Production

(*Continued from page 339*)

Harper of the University of Indiana Law School, the Associate Reporter for Chaper 100—Defamation (Invasions of Interest in Reputation)—discharged the customary functions in relation to the Draft. This subject provided one of the liveliest discussions of the whole meeting. It concerned the rule of liability of broadcasting stations for defamatory statements made over the radio by speakers on leased time.

Assume the strongest case for the station, where the speaker's manuscript has been submitted in advance for approval, and is found unobjectionable, and the speaker is a man of good reputation, and there is no likeihood of his defaming anyone, yet he does in fact interpolate a highly defamatory sentence. Is the proprietor of the station liable as in the case of a newspaper publisher? Or is his liability a lesser one,—that of the proprietor of a hall, who rents it out for a public speech?

The debate at first brought out most strongly the hardship on the proprietor, in the case supposed. There are three decisions. In one, a State official, charged with the duty of collecting and disseminating information on markets, asked for the use of a broadcasting station for a public statement on the milk situation. In the course of a fifteen-minute address he made certain defamatory statements. The injured person sued the station and recovered. A similar result was reached in the other two cases. Towards the close of the discussion, however, one speaker directed attention to the danger to the public if this new and powerful instrument for reaching the people is used loosely, without careful attention to the rights of persons who may be injured by its wrongful use. Finally an advisory vote was taken. The result was practically a tie.

An interesting feature of this part of the Restatement is that it is proposed to classify defamation by radio as libel rather than slander, with the more stringent rule that special damage need not be shown.

This closed the regular working sessions of the Institute. Saturday evening there was the customary banquet at which President Wickersham presided and addresses were made by Hon. Fletcher Riley, Jr., Chief Justice of the Supreme Court of Oklahoma, on "The Administration of Justice;" by Hon. Joseph B. Ely, former Governor of Massachusetts, on the growth of administrative Regulations and the dangers incident thereto; and by Hon. John Dickinson, Assistant Secretary of Commerce, on "Delegation of Legislative Power."

Meetings of Law School Alumni Associations and Legal Fraternities at Los Angeles

The following groups have announced that luncheon or breakfast meetings will be held during the Los Angeles meeting, details of which will appear later.

Cornell Law School Association;
Harvard Law School Alumni;
George Washington Law School Association;
Vanderbilt University Law School Alumni;
Yale University Law School Alumni;
Delta Theta Phi Law Fraternity;
Phi Alpha Delta Law Fraternity;
Phi Delta Delta Legal Fraternity.

Current Events

(*Continued from page* 333)

ported in that period and investigations still pending in 52 of them.

A number of points of interest come to mind which these Government statistics do not clarify. Perhaps they are impossible of accurate determination. For instance, it would satisfy a case of mild curiosity to know how many of these thefts were by gangsters and like professional gunmen; how many were by blood-red communists bent on revolution; and how many were by local huntsmen the better to prepare themselves as soldiers for the next war, realizing how much the nation then would need well trained marksmen.

The facts that the cases tabulated by the Department's statement were reported after the beginning of 1933 but that the statement includes a few cases of such robberies committed in previous years, going back as far as 1929, would seem to indicate either that reports of these cases were not regularly made to the Federal Bureau of Investigation prior to 1933 or that no special statistical record of them then was kept by that Bureau. It does not seem likely that, throughout the whole country, there was only one robbery of this kind in 1929, one in 1930, two in 1931, five in 1932, but 68 in 1933. Whereas, if the formal reporting of these cases to the Bureau of Investigation was begun in 1933, it is probable that only a few of the cases then several years old would have been reported.

Recoveries of the material stolen were good considering the difficulties inherent therein. Of 1,645 pistols, .45 calibre, reported as taken, 40 per cent were recovered. Of 94 Army rifles, .30 calibre, taken, 39 per cent were recovered. Of 81 automatic rifles, .30 calibre, taken, 77 per cent were recovered. Of 21 machine guns taken, 48 per cent were recovered. Of 54 miscellaneous guns taken, 33 per cent were recovered. Of 155,856 rounds of ammunition taken, 72 per cent was recovered.

It was not stated in how many of the 174 reported cases arrests were made, but altogether there were 226 arrests. Apparently one or more murders were committed in the process of these robberies, because among the punishments imposed were four life sentences. Persons awaiting trial were shown to be 30. Therefore 196 of the 226 arrests already have been tried. There were 165 convictions or 84 per cent of those tried, which is a very good record indeed. If the same proportion of convictions is maintained, it will mean 190 convictions out of the 226 arrests.

So far as the Department of Justice and others who prosecute these cases are concerned, they are somewhat in the position of the man locking his barn after the horses are stolen—not from their own choice or fault, but because they are not in control of this property before it is stolen. No doubt, greater precautions are being taken by those who have charge of it at that stage. The results so far in 1935 are encouraging, there having been only 17 of these munitions robberies in the first four and one-half months. If that rate continues, it will mean 45 for the year, which will be a decided improvement over 1934, when there were 80.

Income Tax Publicity

Since the repeal of the "pink-slip" provision has been accomplished, it is well to observe the nature of the new scheme which has taken its place. It now is provided that Federal income tax returns "for any taxable year beginning after December 31, 1934 (or copies thereof, if so prescribed by regulations * * *), shall be open to inspection by any official, body, or commission, lawfully charged with the administration of any State tax law, if the inspection is for the purpose of such administration or for the purpose of obtaining information to be furnished to local taxing authorities * * *. The inspection shall be permitted only upon written request of the governor of such State, designating the representative of such official, body, or commission to make the inspection * * *. The inspection shall be made in such manner, and at such times and places, as shall be prescribed by regulations made by the Commissioner with the approval of the Secretary."

There is a provision for fine or imprisonment or both of any officer who divulges information thus obtained by him. It was indicated by discussion in the House that it might be necessary to require the filing of duplicate returns or copies in order to carry out the intent of this State inspection feature, since the tax returns generally are not kept by the Collectors of Internal Revenue located in the several states but forwarded to Washington and thereafter may be in use at different places. It was apprehended in the Senate that, through a single request addressed by a Governor of a State to the Secretary of the Treasury, or the Commissioner, all the returns from that State might be open for inspection to the properly authorized representative of the State tax officials. In response to this suggestion, it was indicated that, although the requests might come in groups or by special classifications, the matter of permitting State officers to examine the Federal tax returns would not be likely to get out of hand because in the end the method of producing such returns for inspection would be controlled by regulations of the Secretary of the Treasury.

Legislation Proposed

To prohibit the transportation in interstate commerce of the products of child labor. H. R. 7738, to the Committee on Interstate and Foreign Commerce.

To provide for additional compensation to jurors. H. R. 7999, to the Committee on the Judiciary.

Limiting the decisions of the courts of the several States and of the United States relative to legislative acts of the Congress of the United States. H. R. 8054, to the Committee on the Judiciary.

Joint resolution proposing an amendment to the Constitution of the United States defining the jurisdiction of the Supreme Court over questions involving the constitutional powers of the Congress. H. J. Res. 287, to the Committee on the Judiciary.

To designate the first week in May of each year as National Education Week for the Blind. S. 2809, to the Committee on Education and Labor.

Joint resolution authorizing the President of the United States to use the funds of the Imperial German Government, or its successor or successors, and of all German nationals, to settle claims of American citizens against said Government. S. J. Res. 126, to the Committee on Finance.

To make further provision for the abatement and refund of Federal taxes on insolvent banks. H. R. 8075, to the Committee on Ways and Means.

To clarify the definition of total permanent disability for purpose of automatic insurance. H. J. Res. 292, to the Committee on World War Veterans' Legislation.

Authorizing manufacturers to protect their products against unfair or deceptive practices. H. R. 8115, to the Committee on the Judiciary.

To promote safe and efficient service to the public by the national system of rail transportation by providing a retirement system for railroad employees. H. R. 8121, to the Committee on Interstate and Foreign Commerce.

To regulate the Supreme Court in connection with determining constitutionality of acts of Congress and statutes of the several States. H. R. 8123. A similar proposal, except that its title refers generally to "the courts," is H. R. 7997, both bills to the Committee on the Judiciary.

Requesting the Secretary of Agriculture to furnish to the Senate all corre-

spondence in his Department touching the gathering of some three or four thousand farmers in Washington recently, whether instructions were given them by any farm organizations receiving Federal aid, how the group was selected, the purpose of having them come to Washington, and all information with respect to any cost borne by the Federal Government, directly or indirectly, in meeting the expenses of this farmers' gathering. S. Res. 139.

Resolution expressing the appreciation of the House of Representatives of the visit of the delegation of farmers that brought an agricultural good-will message to the Nation's Capital. H. Res. 225. to the Committee on Agriculture.

Deaths of Members Reported to Headquarters

Charles F. Curley, of Wilmington, Del., a member of the General Council of the American Bar Association, died in Wilmington, May 8th.

He was admitted to the bar in 1900, following his graduation from Harvard Law School, and took up the practice of law in Wilmington. He continued in practice until 1916, when he was appointed United States District Attorney, in which capacity he served four years. He returned to private practice and his clientele included a number of important corporations.

In 1930 Mr. Curley was elected President of the Delaware State Bar Association and served two terms.

Samuel Adams, well known practicing lawyer in Chicago, died suddenly in his home on May 20. With the exception of the years 1911-1913, when he was First Assistant Secretary of the Interior, he had practiced almost continuously in Chicago since 1899. Mr. Adams was a member of the American Bar Association and at the time of his death was President of the Law Club of Chicago.

Wesley Martin, Des Moines, Ia., April 29.

Hon. Gardner K. Byers, Assistant Attorney General, Frankfort, Ky.

Hon. W. P. Sandidge, Owensboro, Ky., April 13.

Charles E. Roach, Chevy Chase, Md., April 20.

A. E. McGrath, New Bedford, Mass., April 24.

A. Stanford Lyon, Kansas City, Mo.

Judge C. W. Pomeroy, Kalispell, Mont., April 10.

Henry B. Betts, New Rochelle, N. Y.

C. E. Sox, Albany, Ore., April 17.

E. Butler Moulton, Providence, R. I., March 3.

William A. Fraser, Salt Lake City, Utah, March 2.

A. V. Andrews, Los Angeles, Cal.

M. J. Sherwood, Marquette, Mich.

Ossian Cameron, Winnetka, Ill.

Otis S. Carroll, New York City, March 31.

William H. Gorham, Seattle, Wash., April 6.

Henry Wynans Jessup, New York City.

Francis N. Whitney, New York City.

John D. Blosser, Chillicothe, Ohio, March 21.

Vermont and Texas Advance Bar Admission Requirements

BY rules of the Supreme Court promulgated on May 14th, requirements of general education for admission to the bar in the state of Vermont for students beginning the study of law after August 31, 1938, have been raised to include completion of one-half of the work acceptable for a bachelor's degree in a college approved by the court, or its equivalent. By this action Vermont becomes the twenty-sixth state to adopt the two-year college requirement. As a result of these rules, Vermont joins with Massachusetts, which adopted similar rules last year.

A bill for the two-year college requirement was passed by the Maine legislature during its recent legislative session but was vetoed by the governor.

Efforts of the bar in Texas to eliminate the diploma privilege in that state, whereby graduates of certain law schools were admitted to the bar without examination, have apparently been successful as a bill to this effect has passed both houses of the legislature. It is assumed that it will receive the approval of the governor.

Secretary's Letter, Junior Bar Conference

NEW JERSEY has joined the growing list of states in which the Junior Conference has complete organization. On April 13th, at the invitation of Mr. Joseph Harrison, newly appointed State Chairman, Mr. Paul Hannah, District of Columbia Council member, and myself went to Trenton, New Jersey, and attended a luncheon followed by an all afternoon conference of county chairmen whom Mr. Harrison had tentatively designated. While it was by no means a tea party the progress was rapid and many misunderstandings of the Junior Bar Conference were cleared up. The greatest difficulty arose over the seeming conflict in interest between American Bar Association Junior Bar Conference and the plan to establish a Junior Conference in the New Jersey State Bar Association.

The fact, of course, is that the state organization of the Junior Conference of the American Bar Association is appointive, the state chairman being nominated by the Executive Council member of that judicial district and appointed by the National Chairman. In turn the state chairmen suggest county chairmen. The entire organization must, of necessity, consist of American Bar Association members less than 36 years of age who have indicated their intention of participating in Junior Conference activities.

The most effective type of organization of Junior activities in state bar associations is a replica within the state of the Junior Conference plan. In other words, the members of the Junior Conference, A.B.A., in New Jersey who are endeavoring to secure improved status for the younger lawyers in that state must act entirely in their capacity as members of the state bar association and the county bar associations. The New Jersey Junior Conference, or that of any other state, when completely organized, will merely be affiliated with the Junior Conference of the American Bar Association and in no sense subordinate to it. Perhaps the most effective actual mechanism of affiliation is through the appointment of delegates to the Junior Conference by the officers of the state and county bar associations from among members who are also members of the American Bar Association. It is generally recognized that in time there will be a substantially complete coverage of the United States by conferences of such delegations. The nation wide problems can be debated in this forum and useful information relayed for action by the state bar associations. The Junior Conference, American Bar Association, activities will in many instances parallel but should never conflict with the state organization. An adherence to the ultimate program of a nation wide integration should govern the relationship of all of the bodies.

On the same trip, I had the pleasure of visiting with Mr. Curtis Shears, the member of the Executive Council for the state of New York. Mr. Shears is Assistant U. S. Attorney for the southern district of New York and has been compelled to restrict the time devoted to Junior Bar activities because of the great amount of litigation which his offical position involves. Nevertheless, things are progressing nicely. Many up-state associations and the New York County Bar Association have endorsed

the Junior Conference in the American Bar Association and are laying the groundwork for Junior activities in the State Bar Association and in the two organizations which are representative of the metropolitan area.

Certain of the more conservative lawyers' organizations have treated the activity of the young lawyers in a somewhat "standoffish" manner but the tremendous success from the membership point of view in the American Bar Association and the strong advocacy of our cause by nationally known figures such as Attorney General Cummings and important members of the Executive Committee have tended to stimulate interest which will undoubtedly be followed by at least acquiescence.

Judge William Ransom of the Executive Committee, A.B.A., gave an impromptu luncheon at which Mr. Curtis Shears, Mr. Malcolm A. Crusius, Mr. Weston Vernon, Jr., Mr. John C. Walsh, Mr. Nicholas T. Rogers, Mr. Charles T. Murphy and Mr. John J. Dowling and the writer were present in the ancient Down Town Club. In the course of the general exchange of ideas it became clear that the problem in New York was unique and that it will be necessary to convince many of the younger lawyers that our movement is independently courageous before substantial affiliation can be secured.

As I write this letter responses are pouring in as a result of the invitation extended by President Loftin to the state, county and local bar associations to send delegates to California. If every delegate who has been appointed actually attends the convention, the babe of the Milwaukee meeting will have grown to full stature in the period of one year. My correspondence shows a rapid acceleration in the number of new members being secured by Junior Conference Committees. In Florida, North Carolina, the District of Columbia and particularly in Iowa, where Mr. Owen Cunningham is being persuasive, both senior and junior applications in unprecedentedly large numbers are moving toward headquarters.

The time is approaching when the work of the program and other committees in preparation for the convention will be put to test and you are sincerely urged to transmit to the Executive Secretary of the American Bar Association at the Chicago office your reservation and notice of intention to attend. At the same time if you will send a carbon copy to me, I believe that I can interchange the information to the great advantage of all concerned.

Don't forget that in addition to membership in the American Bar Association registration in the Junior Conference is required. Send in your registration card and do not wait for the convention.

W. A. ROBERTS,
Secretary, Junior Bar Conference.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Arizona

State Bar of Arizona Holds Second Annual Meeting—Committee Appointed to Consider Better Method of Judicial Selection

The second annual meeting of The State Bar of Arizona was held at Tucson on the 26th day of April, last. On the day preceding there was a meeting of the Board of Governors to consider such business as might come before it. The principal business of interest transacted by the Board of Governors was the appointment of a committee of five to consider a better method for the selection of the judiciary than the popular elective system now prevailing.

At the annual meting on the 26th the ballots for the election of governors in districts 2 and 6 were canvassed and the following gentlemen were elected: District No. 2, Wm. P. W. O'Sullivan, Prescott; District No. 6, Charles A. Carson, Jr., James E. Nelson, Henry H. Miller, Charles B. Ward, all of Phoenix, and William H. Westover of Yuma.

W. G. Gilmore of Douglas was elected president for the ensuing twelve months; James E. Nelson of Phoenix,

W. G. GILMORE
President, State Bar of Arizona

Secretary; Henry H. Miller of Phoenix, Treasurer; Francis M. Hartman of Tucson and E. R. Byers of Williams, Vice-Presidents.

The meeting was very largely attended and quite enthusiastic.

JAMES E. NELSON,
Secretary.

Connecticut

State Bar of Connecticut Adopts Plan for Coordinating Activities of Local and County Associations

The Annual Meeting of the State Bar Association of Connecticut was held in Hartford on April 22nd, 1935.

The annual address was made by the President, Hugh M. Alcorn, Esq., of Hartford, and dealt largely with some legal phases of the "New Deal." Dean E. G. Baird, of the Hartford College of Law, read a paper entitled "Present Day Analogy to the Laws of Massachusetts Bay and Plymouth Colonies from 1640 to 1790."

Various Committee reports were made. The report of the Committee on Co-operation between the Local Bar Associations and the State Bar Association was read by Warren F. Cressy, Chairman. A resolution was adopted accepting the recommendations of the report, which will change to a large extent the functions of the State Bar Association. This report has been considered at two annual meetings and its final adoption is the result of careful

thought by many members of the Association.

The recommendations call for an amendment to the Constitution of the Association to provide for the creation of a Board of Delegates, representing the several local and County Bar Associations in the State, and having as its purpose the coordination of the activities of these associations and also the creation of a preliminary conference for the discussion of matters which it may desire to submit to the State Bar Association for action.

Amendments to the Constitution authorizing the organization of sections for the consideration of the several problems relating to the law and setting forth a plan for the application of local and county associations were also recommended in the report.

The present officers were reelected, as follows: Hugh M. Alcorn, Hartford, President; Warren B. Burrows, Groton, Vice-President; James E. Wheeler, New Haven, Secretary and Treasurer.

The annual banquet was held at the Hartford Club. Hugh M. Alcorn, President, acted as Toastmaster. Brilliant addresses were made by Dr. Gordon J. Laing, Dean of the Division of the Humanities of the University of Chicago, and Hon. Robert L. Munger, Judge of the Court of Common Pleas for New Haven County. Dr. Laing warned against the excessive trend of specialization in the professions. He defined culture as a proper appreciation of values in the finer things of life, and stated the old liberal arts education is his recipe for an educated lawyer. He pointed out that in a recent graduation class in the Harvard Law School the three highest men were graduates of Princeton where, he stated, the old liberal arts course is kept up.

JAMES E. WHEELER,
Secretary.

Louisiana

Louisiana State Bar Association Holds Thirty-Eighth Annual Convention—President Loftin Speaks on National Bar Program—Recent State Bar Act Criticized

Widely acclaimed as the most spirited assemblage in its history, the 38th Annual Convention of the Louisiana State Bar Association was held at Alexandria April 26th and 27th.

Hon. Scott M. Loftin of Jacksonville, Fla., President of the American Bar Association, was the guest of honor and principal speaker. Mr. Loftin's address was entitled: "The National Bar Program," and consisted mainly of an appeal for the advancement of standards required for candidates for the bench and bar of the nation. The National Bar Program had already been endorsed by the 1934 convention of the Louisiana State Bar Association, and this endorsement was reaffirmed.

President U. A. Bell of Lake Charles called the convention to order. The invocation was pronounced by Rev. N. E. Joyner, Methodist Church of Alexandria, after which Mayor V. V. Lamkin welcomed the delegates on behalf of the citizens of Alexandria. John R. Hunter then welcomed the visiting lawyers on behalf of the members of the local Bar. Winston K. Joffrion responded on behalf of the visitors.

President Bell delivered his annual address and review of the activities for the past year. Former Congressman J. Zach Spearing delivered an address, his subject being "The Louisiana State Bar Association, Its Past, Its Future." Reviewing its activities from its inception in 1847 Mr. Spearing declared that the organization was founded by gentlemen of the bar of the State in the courtroom of the Louisiana Supreme

Court at New Orleans. Its purpose was two-fold: the establishment of a library, and the maintenance of the dignity of the courts and bar of Louisiana. Numbered among its many accomplishments was the increase in the personnel of the State Supreme Court from five to seven, and the erection of the Civil Courts building at New Orleans. The speaker pleaded with the gentlemen of the bar to become "missionaries and emmisaries in order to make the association's influence greater."

Before adjourning for noon-day recess, the reports of the various Standing and Special Committees were read and discussed. During the afternoon session Howard B. Warren of Shreveport read a paper on "Louisiana Civil Law Literature," prepared by John H. Tucker, Jr., of Shreveport, who, owing to illness, was unable to attend the convention. John D. Miller, of New Orleans, who was later elected President for the coming year, read his paper entitled: "Louisiana Liens and Privileges."

Prolonged applause followed the reading of a paper written by Mr. Walter J. Burke, of New Iberia, whose illness prevented his attendance, and who was represented by Mr. R. E. Brumby, of Franklin. Mr. Burke's subject was: "The State Bar of Louisiana." He analyzed and criticized the recent legislative acts making all attorneys of the State members of a corporation in which they are deprived of any voice, duties or responsibilities, and where all powers are vested solely in a Board to be elected by the voters at large after nominations in the party primaries. He particularly condemned the requirement that candidates for nomination to the Board must file a sworn list of all of their corporate clients and a statement of all emoluments received from such clients during the past five years. In this connection Mr. Burke pointed out that corporations are lawful business associations which have been developed to a high level of usefulness and value under the American economic system. Strangely, he said, the author of the law had not seen fit to require candidates for the Board to file statements showing the names of and fees received from their clients who are recognized as the enemies of society—the criminals, who are, nevertheless, entitled to be represented by counsel and to be convicted according to the law of the land.

JOHN D. MILLER
President, Louisiana State Bar Association

Turning business aside momentarily, the delegates and their ladies attended a dance in their honor Friday night at the Bentley Hotel.

Activities were resumed Saturday morning with an address by Hon. Rufus E. Foster, Judge of the Fifth Circuit Court of Appeals. He delivered a very instructive address on "Some Legal Phases of the War on Crime," in which he summarized the recent congressional changes in the administration of criminal laws by the Federal Courts. Showing that this movement was the outgrowth of the Lindbergh kidnaping, the eminent jurist explained each step taken along these lines by the national legislature: that the following acts were declared Federal crimes only recently: on June 22, 1932, knowingly transporting a kidnaped person in interstate or foreign commerce, a Federal capital offense; on July 8, 1932, mailing threatening letters for extortion purposes; May 18, 1934, transmitting the said letters in interstate commerce in any way; May 18, 1934, traveling in interstate or foreign commerce to avoid prosecution for crimes of violence, and traveling in interstate commerce to avoid prosecution for crimes of violence, and traveling in interstate commerce to evade testifying in felony charges. He explained that the laws concerning procedure were also amended, on May 10, 1934, to provide that where indictments are found defective after the statute of limitations has run, new indictments may be returned during ensuing term of court.

Concerning changes in appellate procedure, Judge Foster said: "Perhaps the most important change in criminal practice was brought about by the Act of March 8, 1934, which gave the Supreme Court authority to prescribe rules of practice and procedure in criminal cases after verdict. Pursuant to that authority the Supreme Court has adopted rules, promulgated May 7, 1934, and effective September 1, 1934. To epitomize the rules they provide: that sentence shall be imposed without delay, and the appeal must be taken within five days after the entry of judgment or within five days after a new trial is denied; motions for a new trial or in arrest of judgment must be within three days after verdict, unless the motion for new trial is on the ground of newly discovered evidence, when it may be made within sixty days. . . It is quite evident that Congress and the Supreme Court intended not only to speed the final determination of criminal cases but also to discourage frivolous appeals. Due process of law does not require the right of appeal. It would be tempering justice with mercy to deny an appeal where there is no possibility of a reversal."

Judge Foster was followed by Mr. Loftin, who explained that four subjects were selected for the National Bar Program: enforcement of criminal law, raising the standards of legal education and of admission to the bar, selection of judges and bar activities connected therewith, elimination of the unauthorized practice of law and, by implication, a necessary fifth, the enforcement of legal ethics. Concerning the second step the speaker declared: "The requirements for admission to the bar must be raised. While it is true that many of our eminent lawyers have not had even a college education, their achievements are the result of their own ability, courage and determination.

Children should be seen and NOT HURT

Prepared by the Safety Department of the Maryland Casualty Company, this composite photograph was distributed throughout the United States in poster form. So many requests have been made for the poster that the Maryland is reproducing it here as one of its contributions to the effort to save children from death or injury at the hands of careless drivers. The Maryland every year spends more than $400,000 in safety work throughout the United States for the protection of life and property.

This advertisement of the Maryland Casualty Company is appearing during June in full pages in Time, Fortune and Business Week.

The average practitioner of today, however, cannot cope with the problems which confront him in the intricate, delicate and complicated relationships of society and commerce with which he is daily brought into contact unless he possesses a comprehensive knowledge of the principles which underlie those relationships.

"Besides, education trains the mind to think according to accepted methods. American and English courts have evolved the system of the common law by logical reasoning. The skill to utilize such method can be acquired only by a practice of it. Before a lawyer undertakes to handle cases where property and personal rights of his client are concerned he should be well versed in this process of reasoning. A knowledge of the history of government, of philosophy, of the social sciences and of political economy, is essential not only to the lawyers in legislative bodies or in an executive capacity, but also to lawyers generally, that they may be able to advise clients properly as to their rights under the statutes which have been passed, and to form correct opinions on movements to accomplish changes in our governmental structure."

And, on the subject of the choice of candidates for the bench Mr. Loftin said: "The adoption of proper methods for the selection of the members of our judicial system is a subject the importance of which cannot be too highly emphasized. It is of grave consequence in America, where universal suffrage and tendency to settle questions by resorting to election prevail. Courts cannot decide controversies by mathematical processes or by the counting of hands. The number of people who are for or against a particular proposition cannot determine its wisdom or justice, for the relative number of proponents and opponents may be controlled by the selfish advantages or disadvantages which will accrue to them respectively."

A resolution was adopted appointing a committee to make an effort to bring the 1936 convention of the American Bar Association to New Orleans.

The convention unanimously adopted three resolutions: to continue the Association under its charter, condemning as wholly unwarranted recent attacks upon certain justices of the Supreme Court and judges of the District Courts of the State, and condemning the legislative incorporation of the bar as an affront to an honorable profession.

The last business session closed with the election of officers. John D. Miller, of New Orleans, was unanimously chosen to succeed Mr. Bell as President for the ensuing year.

On accepting office the new President pointed out that the Association was perhaps the only disinterested body in the State to whom the people could look for assistance in maintaining a constitutional form of government, and made an earnest plea for an increase in membership to enhance the value of the Association to its members and its usefulness to the public.

The convention then adjourned to the Rapides Golf and Country Club, where the balance of the day was consumed at a country barbecue, golf tournament, and sightseeing.

The convention was befittingly brought to its conclusion with a banquet Saturday night, at which appropriate addresses by Mr. Loftin, Judge Foster, Judge W. W. Westerfield and John D. Miller of New Orleans, and Edward Dubuisson of Opelousas, were delivered. Nathaniel P. Phillips, of New Orleans, was Chairman of the Banquet Committee.

The locality for the 1936 convention will be chosen by the Executive Committee at a later date.

W. W. YOUNG,
Secretary.

New Orleans, La., May 15, 1935.

NATHAN P. AVERY
President, Mass. Bar Association

Miscellaneous

The members of the Fifth Judicial District of Minnesota Bar Association held their annual meeting at the Hotel Faribault, in Faribault, Minnesota, on the evening of May 4, 1935. The meeting was exceptionally well attended. It commenced with a dinner at 7:00. The address of the evening was delivered by Hon. Herbert M. Bierce of Winona, Referee in Bankruptcy, on the subject: "Liquidating Debtors' Affairs."

Officers elected for the coming year are: President, William W. Pye, Northfield; Vice-President, C. D. Simpson, West Concord; Secretary, Charles N. Sayles, Faribault; Treasurer, Otto Nelson, Owatonna; Member of the Board of Governors of Minnesota State Bar Association, Harold S. Nelson, Owatonna.

CHARLES N. SAYLES,
Secretary.

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